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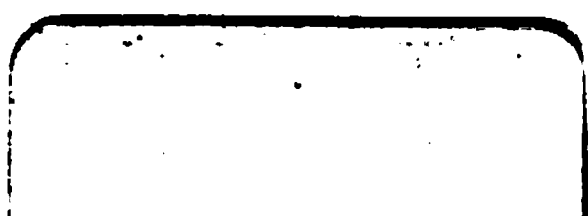
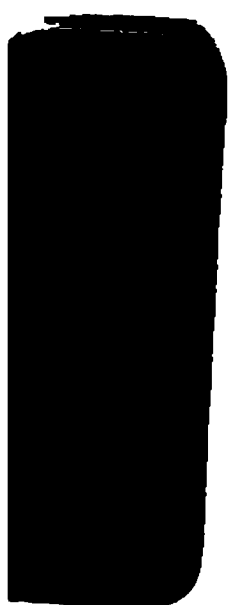
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AMERICAN REPORTS:

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON

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CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

THE CITY OF AURORA, appellant, v. REED et al.

(57 ILL. 22.)

Municipal corporation — grading of streets — cannot discharge surface water on adjacent lots.

A municipal corporation cannot so adjust the grade of its streets as to turn surface water upon the lots of adjacent owners; nor can it lawfully permit property owners on a street to fill up a portion thereof in front of their lots in such a manner as to turn the surface water upon the property of others.

THIS was an action on the case, brought against the city of Aurora by appellees, to recover for damages caused by surface water, which ran from an adjoining street into and upon the premises of appellees. Their building was situated on River street, which runs north and south near the west bank of Fox river. The street is occupied for business purposes, and the buildings come to the line of the street on both sides. Before the buildings were erected, all the surface water from rain and snow, westward of this street, flowed to the river over these lots, much of it passing over the lot on which appellees' house is erected. There being a depression in the ground, inclining from the west toward the river, the erection of buildings on the west side of the street, which were from time to time built and filled the block, obstructed the natural flow of the water caused by rain and snow, and turned it into the cross streets running east

The City of Aurora v. Reed.

and west, and leading into River street, thus largely increasing the volume that flowed along that street in front of appellees' premises.

It appears that in 1862, and while Dunning owned this lot, the property owners of the block entered into an arrangement with the city authorities, by which they were to put in a gutter in front of their property; Dunning afterward refused to carry out the arrangement, but the others constructed the gutter under the direction of the street commissioner. Dunning sold this lot in 1864 or 1865, to Smith, the lessor of appellees, who erected thereon the building occupied by appellees. This building obstructed the flow of water over the lot, as it had previously run. Appellees kept in the house a grocery store and eating-house, the basement being used as a dining-room. On at least three occasions, when heavy rains had fallen, the water ran into the basement of appellees' building, to the depth of from one to three feet. It occasioned some damage to their property, the loss of the use of the room some days, required labor and expense in removing the water, and some of their boarders left. The jury found a verdict in their favor for \$56.81. A motion for a new trial was entered, but overruled by the court, and judgment entered upon it, and the case is brought to this court by appeal, and a reversal is asked, on several grounds.

Canfield & Nichols, for appellant.

A. J. Matsner, for appellees.

WALKER, J. [After deciding a question of practice.] In the case of *Nevins v. The City of Peoria*, 41 Ill. 502, it was held, that a city has full control over the grade of its streets, and can make them on such angle as they choose, and may lower or elevate them at pleasure, and the owners of lots adjacent to the streets cannot call it to account for errors of judgment in these particulars, or recover damages because they incur inconvenience or expense in adjusting the level of their premises to that of the street, for purposes of ingress and egress. But a city has no more power over its streets than a private individual has over his own land, and the city, under the plea of public convenience, cannot be permitted to exercise that dominion to the injury of the property of another, in a mode that would render an individual liable to damages, without itself becoming responsible. The same rule of law which protects the right of property in an individual, against invasion from another

The City of Aurora v. Reed.

individual, must protect it from similar aggressions on the part of municipal corporations.

If, in fixing the grade of a street, a city turns a stream of mud and water upon the grounds and into the cellar of one of its citizens, or creates in his neighborhood a stagnant pond that generates disease in his family, it becomes liable to respond in damages. This case was followed by the case of *The City of Aurora v. Gillett*, 56 Ill. 132, which announces the same rule.

In this case, it appears that the city had, through the proper officer, fixed the grade some years previous to the time when the injury complained of occurred. It is true the property owners improved the street, but it was under the direction of the officer. And the evidence tends to show that it was so done that the water which fell in rains, and from melting snows, run from both north and south of the premises occupied by the appellees, and discharged itself over the lot on which this building was erected and one which adjoined it. The city had no right to turn this surface water upon this or any other lot. In a state of nature it was not, so far as we can see, accustomed to convey all the water which accumulated in the street to its outlet into the river. The city had no right to render this lot worthless, and thus deprive the owner of its use, without making full compensation for the injury done. Nor does it change the principle, that the improvement of the street was made before the house was erected. The owner had the undoubted right to improve and occupy his lot, and if the city had turned the water upon it, they should have taken the necessary steps to remedy the wrong they had done, in so grading the street as to cause the water to flow over this lot.

Nor can it change the liability of the city, by showing that others filled up a portion of the street in front of their property, so as to turn the water upon this property. The improvement of the streets is in charge of the city, and is entirely under its control, and it is the duty of the city officials to prevent obstructions from being placed in the streets, and, neglecting that duty, the city must be held liable for the damages resulting therefrom. Nor is it a defense to show that appellees might have dug ditches or made other improvements that would have protected their property from loss. It is enough to say that they were under no legal obligation to perform a duty which devolved upon the city. The adjoining lot did not belong to them, and they had no legal right to construct a sewer

Frank v. Morris.

over another man's property, or to turn water on his lot. It was the duty of the city to provide suitable and proper sewerage to carry off water that accumulated in this and other streets. It is armed with the necessary power to provide the means, and if need be to condemn the ground required for sewers, or to use the streets for the purpose when practicable. We fail to perceive that any defense is shown to a recovery in this case.

This disposes of the questions raised on the refusal of the court to give a portion of appellant's instructions; and the instructions given for the city were certainly as favorable, if not more so, than it had the right to ask.

The judgment of the court below is affirmed.

Judgment affirmed.

FRANK *et al.*, appellants, v. MORRIS.

(57 Ill. 122.)

Usury — how pleaded — proof of.

Where by statute, the taking of usury does not avoid the contract, but the lender forfeits the interest, the defense of usury is not admissible under the plea of non-assumpsit, but must be pleaded specially and proved strictly as averred.

APPEAL from the superior court of Chicago. The opinion states the facts in the case.

Gookins & Roberts, for appellants.

Jewett, Jackson & Small, for appellee.

THORNTON, J. Three questions are presented by the record in this case.

The question of practice arises from the rule of the superior court of Chicago, referred to and approved by this court in the case of *Wallbaum v. Haskin*, 49 Ill. 313.

In the superior court an action in assumpsit was instituted on this note:

Frank v. Morris.

"\$4,000.

CHICAGO, November 8, 1869.

"Seventy-five days after date we promise to pay to the order of James Morris, Four Thousand Dollars at Leopold, Mayer & Steine, Chicago, Ills., value received.

"[U. S. Rev. Stamp, \$3.]

"JACOB H. FRANK,
"G. GOLDSCHMIDT."

The general issue was filed, and a special plea of usury, alleging, in substance, that the note sued on was for the loan of three thousand and eight hundred and fifty dollars principal, and one hundred and fifty dollars interest for the forbearance of that sum for seventy-five days.

Issue was joined and the usual affidavit of merits, under said rule, was filed. Thereupon appellants filed an affidavit, detailing the facts, for the purpose of showing that the defense was made in good faith, alleging that appellee held their note for eight thousand dollars; that the note sued on was for the balance due on said first note; and that for forbearance of payment for seventy-eight days, they paid, as interest, to appellee, one hundred and twenty-five dollars. The court ordered the cause to be then tried, as though no affidavit had been filed.

This was not error. Under the pleading the facts were not admissible. The rule required that it should be made to appear to the court that the defense was made in good faith. A detail of facts which the law will not permit to be proved does not constitute "good faith," within the meaning of the rule.

The note having been received in evidence, the appellants offered to prove the facts set forth in their affidavit. This was refused and this refusal is assigned for error.

Was the variance between the plea and the evidence offered of such a character as to justify the court in the exclusion of the evidence? Did the statement of the time and sum, under a *videlicet*, aid the defective plea? When the matter alleged in a plea is material and traversable, the statement of such matter under a *videlicet* will not avoid the consequence of a variance. Such matter, if traversed, must be proved. 1 Chitty, 317; Gould's Pleadings, 70. The plea alleged the payment of one hundred and fifty dollars, for the forbearance for seventy-five days; the evidence offered was the payment of one hundred and twenty-five dollars for forbearance for seventy-eight days.

Where usury is specially pleaded, the proof must correspond with the pleading; and unless such correspondence exist, the proof must be rejected. Such a defense is in the nature of a penal action, and great strictness is required in pleading it. *Beach v. Fulton Bank*, 3 Wend. 575; *Smith v. Brush*, 8 Johns. 83; *Lawrence v. Knies*, 10 id. 140. In the last case the court say: "The rule even requires the contract to be more precisely stated in a plea of usury than in a declaration in a *qui tam* suit, because the facts are within the defendant's knowledge." We think that the variance in the sum is fatal, and that the court properly rejected the evidence under the special plea.

Was the defense of usury admissible under the plea of non-assumpsit? At common law such a defense could be made under this plea, for usury made the contract void. Our statutes have never made an usurious contract void. At common law usury is a bar to any recovery; under our law it is only a partial defense. As it is in the nature of a penal action, and he who attempts to avail himself of it should be held to strict proof (*Hancock v. Hodgson*, 8 Scam. 831; *Law v. Morrils*, 6 Wend. 279), the rule governing a defense which wholly defeats the action should not prevail. Usury might be given in evidence under non-assumpsit, at common law, for such proof showed that the plaintiff never had cause of action. Lord Chief Baron GILBERT says: "On this issue (non-assumpsit) every thing may be given in evidence which disaffirms the contract, for that goes to the *gist* of the action, since if there be no contract to be performed at the commencement of the action, there could be no trespass for non-performance of it, and therefore a release goes to the *gist* of the action, for it shows there was no contract at the time it was commenced. So every thing which shows the contract to be void may be given in evidence under the general issue, for on a void contract the plaintiff has no right of action. Whatever goes to show there was no contract, or that it was performed, or paid, or released, goes to the *gist* of the action, and need not be pleaded." The present case is not embraced by this rule, nor by the reasons of it. In this case, the plaintiff in the court below was only subject to a forfeiture of the whole of the interest, if the usury had been proved. To enforce this forfeiture a special plea is necessary.

It has been urged in argument, that a contrary doctrine is established in *Stockham v. Munson*, 28 Ill. 53. We do not so construe it. There are *dicta* in the opinion looking in that direction. The

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Instrument declared on, in that case, bore thirty-six per cent interest on its face, and the decision is, that a special plea of usury was unnecessary, for the reason that the usury appeared by the contract and in the declaration. It was therefore pleaded by the plaintiff, and it would have been the merest folly to have required the defendant to replead it.

This court has decided, since the act of January 31, 1857 (the latest enactment upon the subject of interest), that the defense of usury should be by special plea. The section of the statute of 1857 embracing the forfeiture is quoted in the opinion. *Haddon v. Innes*, 24 Ill. 384.

We therefore think that the reasons for the common-law rule, which permits the usurious contract to be given in evidence under the general issue, do not obtain in this State; and that it is more in consonance with the intent of the statute that this defense should be specially made.

The judgment of the superior court is therefore affirmed.

Judgment affirmed.

Justices McALLISTER, SHELTON and WALKER dissented.

MORTON *et al.*, appellant, v. NOBLE.

(57 Ill. 178.)

Dower — when barred by inoperative deed.

A wife, for the purpose of releasing dower, joined in her husband's conveyance, which the grantee failed to record. Afterward a subsequent creditor of the husband recovered judgment against him, and the land so conveyed was sold on execution. *Held*, that, though the prior conveyance was thus avoided, the right of dower was barred.

PETITION for dower filed by Charlotte Noble. On final hearing the court decreed according to the petition, and the defendants appealed.

Sloper & Whiton, for appellants.

Holbrook & Dale and *Higgins, Swett & Quigg*, for appellee.

SCOTT, J. The appellee, by proof of her marriage with Noble, his death and seisin of her husband during coverture, having made out a *prima facie* case entitling her to dower, the question arises whether the defense set up by the appellants is sufficient in law to bar her dower.

From the stipulation as to the facts, it appears that Mark Noble, the husband of the appellee, was seized in fee simple of the land in which dower is claimed, and that on the 7th day of October, 1836, he and his wife, the appellee, duly made, executed, and both acknowledged in due form of law, a deed conveying the title in fee simple to Benjamin Harris, which deed was delivered to Harris on the same day, but was not recorded until the 31st day of August, 1837. After the making and delivery of the deed to Harris, but before the same was recorded, one Jefferson Gardner recovered a judgment in the municipal court of Chicago, against Mark Noble, for the sum of \$251.56, which judgment became a lien on real estate on the 7th day of July, 1837. At the date of the conveyance to Harris the land was vacant and unoccupied, and such proceedings were subsequently had that the premises were sold on an execution issued on the Gardner judgment, and Harris failing to redeem, the title matured in the purchaser at that sale, and the appellants now claim title through certain *mesne* conveyances as the grantees of the purchaser.

Mark Noble died in 1863, intestate, and the appellee filed her petition claiming dower in the premises.

It is not questioned that the deed of July 7, 1836, was sufficient to release the right of dower if the title had remained in Harris, but it is insisted that, inasmuch as the title was defeated in Harris by reason of the sale on the Gardner execution, the dower is not barred, and the appellants, not connecting themselves with or claiming under the Harris title, cannot set up the release of dower to him to defeat the defendant in this proceeding.

It will be observed that Harris obtained a perfect title to the land, free from all incumbrances. The title thus acquired remained in him for the period of about one year, and was only defeated by the *laches* of Harris, in not complying with the registry laws of this State, and by no fault or neglect of the grantor, Noble.

We fully recognize the doctrine, that when the deed from the husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors, or from any pre-

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vious lien or incumbrance, or where the purchase-money is recovered back for a defect of title in the husband, or by reason of any wrongful act on the part of the husband, the dower is not barred by the deed. *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 id. 483; *Gove v. Cather*, 23 id. 634; *Stribling v. Ross*, 16 id. 122.

This case does not fall within the rule announced in any of the former decisions of this court. We have been referred to no case that holds that where the husband and wife conveyed a perfect and indefeasible title, and where the title was subsequently lost solely by the fault and neglect of the grantee, the dower would be restored. It is difficult to comprehend upon what principle such a doctrine could be maintained.

The doctrine of the cases cited above rests upon sound reason. In case the title does not pass by the deed of the husband and wife, the dower will not, and hence the grantee takes nothing.

It is a familiar principle, that a widow cannot release her right of dower to a stranger to the title, but in this instance the release was to the owner of the fee, and for that reason it was effectual. Harris was in no sense a stranger. By the deed from the demandant and her husband, he became vested with an absolute and indefeasible estate in the land. The title never failed. It was lost simply by the *laches* of the grantee.

There are many ways in which Harris, by mere neglect, could have allowed the title to pass from him. The land being vacant and unoccupied, he might have suffered a party to make an entry and hold possession for twenty years, until the right of possession had matured into an absolute title as against him. Had the title been lost in this way, it would hardly be insisted that the demandant in this case would be entitled to dower in the premises, simply by reason of the failure of Harris to assert his rights within the period fixed by the statute of limitations.

It is insisted, that Harris was not seized of the land as against the creditors of Noble, for the reason that the deed was not recorded in apt time. That was no concern of the grantor, it was not in his power to compel the grantee to place his deed on record. It does not appear that there were any creditors of Noble at the date of the conveyance. If the grantee chose to withhold his deed from record, the grantor could not prevent it. But it is not true that Harris was not seized of the land as against the creditors of Noble. He was in fact seized of an absolute title as against all the world, and held it for

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the period of one year, and might have continued to hold it forever, except for his own *laches* in not complying with the registry laws of the State.

We are of opinion, therefore, that the deed to Harris was effectual to pass the right of dower, and the title never having failed or been defeated by reason of any prior lien or incumbrance, or any act on the part of the grantor, the right of dower is forever barred.

For the reasons indicated, the decree of the superior court is reversed, and the cause remanded.

Decree reversed.

Justices WALKER and McALLISTER dissented.

SPAIDS, appellant, v. BARRETT *et al.*

(87. ILL. 289.)

Duress of property — when will avoid contract. Action for maliciously suing out attachment. Pleading.

Goods requiring special care, and of a perishable nature, were wrongfully taken and kept from the owner thereof by means of a writ of attachment fraudulently obtained, and were rapidly going to destruction, and the party in possession refused to surrender the goods on payment of the sum actually due, demanding more than twice that amount, and, in addition thereto, a release from all damages for his wrongful acts, and the defendant in the attachment, to obtain possession of his property, paid the sum demanded and executed the release. In an action on the case for wrongfully suing out the attachment, *held* (1), that the release could be avoided on the ground of duress; (2), that the party injured was not restricted to an action on the attachment bond, but could maintain the action on the case; (3), that the declaration need not allege "want of probable cause" in terms, but that it would suffice if such want was substantially alleged.

ACTION on the case. The opinion states the facts.

Sleeper & Whiton, for appellant.

Henry S. Monroe, for appellees.

THORNTON, J. The question presented in this case, as to the sufficiency of the declaration, will be considered as on a motion in arrest of judgment.

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The demurrer was properly sustained to the second count. It is nothing more than a count in slander, based upon an alleged libellous affidavit, filed in a legal proceeding. Whatever is said or written in such proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it. 1 Hill. Torts, 344; *Warner v. Paine*, 2 Sandf. 195; *Garr v. Selden*, 4 Comst. 91.

The first count alleges that the plaintiff was a dealer in oysters, and doing a large and lucrative business, and was indebted to appellees for transportation, etc., in the sum of \$1,000, which he was able and willing to pay, and that they maliciously, intending to injure him and deprive him of his business, procured Barrett, one of appellees, to make an affidavit, and that he did make an affidavit that plaintiff was indebted to the express company in the sum of \$2,996.30, for transportation, etc., and that he had fraudulently conveyed and assigned his property, and was about fraudulently to conceal, assign, or otherwise dispose of his property, so as to hinder and delay his creditors; and that appellees then filed said affidavit with the clerk of the circuit court of Cook county, and obtained a writ of attachment, and procured the levy thereof upon \$5,000 worth of oysters, and deprived the plaintiff of possession, and neglected to take care of them; by reason whereof they became of no value.

The declaration further alleges that it was not true that the plaintiff had fraudulently conveyed or assigned, or intended to conceal and assign, his property, so as to hinder and delay his creditors; that he was not indebted in the amount mentioned in the affidavit, and that the same was false and fraudulent, and well known to be so by appellees; and that they wickedly and maliciously, intending to injure and extort a large sum of money from him — nearly \$2,000 more than was due upon a fair accounting — refused to permit the oysters to be delivered to him, except on the payment of the sum in the affidavit mentioned; and that he, under protest, and to save his property from utter ruin, paid the same, not knowing that the oysters had sustained serious injury, by reason of the carelessness of appellees.

To this count, the general issue and a special plea of release were filed.

To the special plea the plaintiff replied *non est factum*, and that the release was obtained by duress of property. A demurrer was interposed to the special replication, which was sustained, and the plaintiff abided.

Three questions are raised by the record, and in the argument: First, is the special replication a good defense? Second, is not the plaintiff restricted to his remedy on the attachment bond? Third, is the count bad, on motion in arrest, for omitting to aver the termination of the suit, and the want of probable cause?

Upon the first question the authorities differ. All promises made and contracts entered into, where there is duress of the person, may be avoided. The reason is that the person is induced to do the act by restraint of his liberty, or menace of bodily harm. But it has been held that an agreement, under duress of goods, is not void, and that the person thus circumstanced must exert himself and resist the compulsory influence, when his property is in danger. We cannot appreciate the difference. Liberty and life are justly dear to all men, and so is the exclusive right to possess, dispose of, and protect from destruction, our property. We cannot forget the fact that the desire for property is a strong and predominant characteristic of man, in organized society. An act done, prompted by this desire to preserve, and impelled by fear of the destruction of goods, is not voluntary. It is an act of compulsion. In *Fashay v. Ferguson*, 5 Hill, 158, BRONSON, J., said: "I entertain no doubt that a contract procured by threats, or the destruction of property, may be avoided on the ground of duress. It wants the voluntary assent of the party to be bound by it. Why should the wrong-doer derive advantage from his tortious act?"

Consent is the essence of all contracts. Without it there may be the shadow, but not the substance. Money paid, as the only means to recover the possession of property to which the party is entitled; or, money paid to obtain possession of goods, where wrongfully taken, may be recovered back. *Steph. Nisi Prius*, 1358; *Chase v. Dwinal*, 7 Greenl. 134; *Oates v. Hudson*, 6 Exch. 346; *Nelson v. Suddarth*, 1 Hen. & Munf. 350. If money could be recovered back, under the circumstances, why is not the release void? It was not obtained with the consent intended by the law. Property, which required especial care, had been, by fraud, perjury and extortion, wrongfully taken; was of a perishable nature, and rapidly going to destruction. The party having possession refused to surrender on payment of the actual indebtedness, but demands more than double the sum due, and in addition thereto a release for all damages for the wrongful acts—for the malicious violation of right and law. It would be a scandal to a court of justice if a release given under

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such circumstances could not be avoided. We think the special replication a good answer to the plea, and that the demurrer should have been overruled. *Nelson v. Suddarth*, 1 Hen. & Munf. 350; *Sasportus v. Jennings*, 1 Bay (S. C.) 470; *Collins v. Westberry*, 2 id. 211; *Bane v. Detrick*, 52 Ill. 19.

We entertain no doubt that an action on the case lies for maliciously suing out an attachment and seizing the goods of the debtor, even though there was at the time some indebtedness; when the indebtedness claimed exceeded the actual amount, \$2,000, the levy was grossly excessive, and the object was extortion and oppression, attempted to be sustained by fraud and perjury. The party injured is not restricted to a suit on the bond. In many cases the amount of the bond would not be sufficient to compensate for the wrong—the loss of property, the destruction of business and deprivation of profits—and the injury to feelings and reputation. In case exemplary and vindictive damages were given, the bond would be no security. It is claimed that the attachment bond is similar to an injunction bond, and that the case of *Gorton v. Brown*, 27 Ill. 489, is in point. The court did decide, in that case, that an action could not be maintained for maliciously suing out a writ of injunction, because the injunction bond was intended to indemnify the party for all damages, in case the injunction is dissolved. This court has restricted the damages, in such case, to the judgment enjoined, and costs, and such damages as may be awarded by the court, upon the dissolution of the injunction. *Roberts v. Fuhs*, 36 Ill. 271. This, too, is the language of the statute. The condition in the attachment bond is entirely different. It provides for the payment of such damages as shall be awarded, “in any suit or suits which may hereafter be brought for wrongfully suing out the attachment.” This evidently contemplates suits, in addition to a suit on the bond, for on that there could be but one suit. In the case in 27 Ill., *supra*, the court assigned, as one reason for its opinion, that only one authority could be found in the books to sustain such a suit for suing out a writ of injunction. For the action in this case there are numerous authorities: *Savage v. Brewer*, 16 Pick. 456; *Bump v. Betts*, 19 Wend. 421; *Donnel v. Jones*, 13 Ala. 490; S. C., 17 id. 689; *Lindsay v. Larned*, 17 Mass. 190; *Whipple v. Fuller*, 11 Conn. 582; *Tomlinson & Sperry v. Warner*, 9 Ohio, 103; *Weaver v. Page*, 6 Cal. 681.

We have decided that the attachment suit was not terminated by

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consent, and that the release was obtained by duress of property. The averment in the declaration is, that the money claimed in the writ of attachment was paid to save the property from total ruin. The payment of the money released the property from the levy, and ended the suit. This is equivalent to an averment of a termination of the proceedings in attachment. The omission of such averment is, however, cured by verdict. 1 Chit. Plead. 679; 3 Steph. Nisi Prius, 2279; *Skinner v. Gunton*, 1 Saund. 228; *Young v. Gregorie*, 3 Call, 391; *Wine v. Ware*, 1 Siderfin, 15.

The current of authorities in the American courts is, that the averment of the want of probable cause is the *gist* of this action. We do not, however, hold that the words, "without any reasonable or probable cause," are indispensable. Language may be used having the same meaning; and if this necessary averment of the want of probable cause is included in the sense of the declaration, it should be held sufficient. The averments in the declaration in this case are, substantially, that appellees wickedly and maliciously, intending to injure and ruin appellant and extort money from him, procured the making of an affidavit and the issuance of a writ of attachment; and that they knew that the statements in the affidavit were false. If these averments be true, there could not have been any probable cause for the proceeding in attachment and the seizure of the property of appellant. If willful perjury was committed — and this is charged — then there was no cause whatever for the prosecution. The averments in the declaration negative the existence of probable cause, and are equivalent to the positive assertion of a want of probable cause. *Savage v. Brewer*, 16 Pick. 456; *Maddox v. McGinnis*, 7 Monr. 370; *Young v. Gregorie*, 3 Call, 386.

The averments in the declaration, and proofs offered, if they can be made, show a most iniquitous abuse of legal process to extort money; and courts of justice had better be abolished if they can afford no redress for such oppression. The court, therefore, erred in the rejection of the evidence offered. For the errors indicated, the judgment is reversed, and the cause remanded.

Judgment reversed.

NOTE.—See, to the same effect, *Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312.—*END*

Chapin v. Dake.

CHAPIN, appellant, v. DAKE

(57 Ill. 205.)

Illegal contract—gambling—when contracts for gambling consideration void.

A statute provided that all promises, notes, bills, contracts, etc., made upon any gambling consideration should be void; that a court of equity might set aside any such promises, etc., and that no assignment of any bill, note, agreement or other security, as aforesaid, should, in any manner, affect the remedies of any person interested therein. The plaintiff indorsed certain drafts payable to his order, staked them at faro and lost. The drafts were subsequently transferred in the usual course of business, and without notice, and for a valuable consideration, to the defendant. In a suit to cancel the indorsements, and to have the drafts delivered to the plaintiff, *held*, that the indorsements were void; that the defendant acquired no title to the drafts and that the plaintiff was entitled to the remedy sought.

THIS was a suit in chancery by Dake against Donaldson, the Fifth National Bank of Chicago, and Chapin & Gore, to have two drafts delivered to him, and the indorsement thereof canceled. The Fifth National Bank filed a cross-bill, alleging its readiness to pay the drafts to the lawful owner, and asking that the other parties be ordered to interplead and settle the ownership.

The court found the title to the drafts to be in Dake, and ordered the Fifth National Bank to pay into court, for Dake, the amount of the drafts. There were several directions with regard to the costs of the several parties which need not be stated. Chapin & Gore appealed.

C. M. Hardy, for appellant.

W. T. Burgess, for appellee.

SHELDON, J. This was a bill in chancery, filed by Moses W Dake, to have two certain drafts for \$1,000 each, drawn by the Fifth National Bank of Chicago upon the Ninth National Bank of New York, payable to the order of said Dake, at sight, by him indorsed and in the hands of Chapin & Gore, delivered to said Dake and the indorsements canceled, and to enjoin the payment of the same to Chapin & Gore, on the alleged ground that the drafts were

lost by Dake at gaming, and subsequently came into the hands of Chapin & Gore as indorsees.

It appears that Dake staked one of said drafts, after first indorsing it, and lost it, playing faro, and that it was delivered to one Donaldson, who was in some way concerned in receiving the proceeds of the faro bank.

That Dake then staked the other draft, lost \$500, delivered the draft, indorsed by him, in payment of his loss, and received from the dealer \$500 in currency in change.

The first section of the gaming act declares, that all promises, notes, bills, contracts or other securities made, etc., upon any gambling consideration, shall be void and of no effect.

The second section enables the loser to recover, by action at law, from the winner, any money or valuable thing, or its value, lost at play, amounting to the sum of \$10.

The third section provides, that all notes, bills, promises, agreements, and other acts, etc., executed contrary to the provisions of the act may be set aside by any court of equity, etc.; and the fourth section provides that no assignment of any bill, note, agreement or other security, etc., as aforesaid, shall in any manner affect the defense of the person entering into or executing the same, or the remedies of any person interested therein.

Under the broad language of the statute, and within its true meaning, we think the indorsement of these drafts was void; that Chapin & Gore, although *bona fide* holders, acquired no title thereby in the drafts, and that the property in them still remains in Dake.

The indorsement of the drafts was a contract or agreement between the parties — it is said, that a transfer by *indorsement* is equivalent in its effect to the drawing of a bill; the indorsement was clearly void as between the parties to the transaction, and, we think, under the statute, the legal consequence must be the same of such an indorsement in the hands of a *bona fide* holder — that no more effect is to be given to it than to a forged indorsement. Such a construction is necessary to effectuate the intention of the statute, and prevent its being avoided by making use of antecedent securities and transferring them to innocent parties.

Under the English statute of Queen Anne, substantially like ours, a bill of exchange or promissory note given for a gambling debt is held void in the hands of a *bona fide* holder. Chitty on Bills, 111 a, ed. of 1836. And it is so in those cases in which the legislature

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has declared that the *illegality* of the contract or consideration shall make the *security*, whether bill or note, *void*. Id. 115.

This act of indorsement was contrary to the provisions of the statute, and the third section provides that acts contrary to the provisions of the statute may be vacated by a court of equity; and, under section four, no assignment of any bill, note, agreement, etc., shall in any manner affect the defense of the person executing the same, or the remedies of any person interested therein.

The appellee's loss was only \$1,500; he has now in his hands \$500, which he received by way of change, in paying a loss of \$500 with a \$1,000 draft. He cannot hold that \$500, and recover the two drafts in full. He would thereby reap a profit of \$500 out of this gaming transaction; this he should not be suffered to do, by the aid of a court of equity. To entitle himself to the relief he claims, he must do equity by refunding to Chapin & Gore this \$500.

On the cross-bill of the Fifth National Bank, it should not have been allowed \$100 solicitor's fees, but only its costs. It should have paid an additional \$100 into court.

There should not have been any allowance to the appellee of interest on the drafts.

All the statute enables him to recover is the money or things lost, with costs.

The costs of the original suit, but not of the cross-bill, would have been properly adjudged against Donaldson.

The decree of the court below must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

LAWRENCE, Ch. J., SCOTT and McALLISTER, JJ.: We cannot concur with the majority of the court in holding that an innocent indorsee of the drafts in question, who has taken them in due course of trade and upon a valuable consideration, should be required to surrender them.

Hough v. The Aetna Life Insurance Co.

HOUGH, appellant, v. THE AETNA LIFE INSURANCE COMPANY.

(67 Ill. 312.)

Principal and surety — notice to surety. Subrogation

The general agent of an insurance company, appointed as local agent, and took from him a bond in the name of the company, with sureties, conditioned that the local agent should pay over all moneys received by him. The local agent having made default in paying over certain moneys received for premiums, the general agent paid the same in accordance with his contract with the company. In an action upon the bond, in the name of the company, for the use of the general agent, *held*, (1) that the payment by the general agent did not discharge the bond so as to prevent subrogation; (2) that notice to the sureties of defalcation of the principal was not necessary in order to charge the sureties.

ACTION on a bond. The opinion states the case.

Wilson & Vallette, for appellant.

Brackett, Waite & Driscoll, for appellee.

THORNTON, J. Wallis, as principal, and appellant, as his surety, executed the bond sued on, with the condition annexed, that Wallis, as a local agent of the company, would pay over all moneys received by him, less his commissions.

Raymond, for whose benefit the suit was brought, was the general agent of the insurance company, and, by his contract, was bound to pay over all moneys received in the general management of the affairs of the company; and had paid, before suit, the amount of the defalcation of Wallis, who was bound to make monthly returns; and when he failed to pay the money, he gave to Raymond promissory notes to be paid within a few days. These notes had not been surrendered at the time of the trial.

Three questions arises:

First. Was the settlement of the delinquencies of the local agent, by the general agent, a payment and discharge of the bond, so as to prevent subrogation?

Second. Is the security released because no notice was given to him of the defalcation of the principal?

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Third. Should the notes have been surrendered before judgment?

Raymond was not co-surety, and it cannot properly be assumed that he paid the defalcation as such. Suretyship is an accessory agreement, by which one person binds himself for another already bound. Whereas the liability of the general agent was distinct from, and anterior to the liability of the obligors to the bond.

The principal of subrogation has special application to the facts of this case.

The rule is, that if the person who pays the debt is compelled to pay for the protection of his own interests and rights, then the substitution should be made. A mere stranger or volunteer cannot thus be subrogated to the creditor's rights.

By the terms of the agency, the principal agent was responsible for all premiums. This liability arose, not only by contract but from his relation to the company and to the local agents, and his right to appoint them. His reputation was involved, and his position could alone be maintained by the regular monthly payment of all sums received by the local agents. He was compelled to pay, not only by agreement prior to the date of the bond, but for the protection of his own rights.

The obligation, then, of the general agent to the company, was wholly independent of the obligation of the local agents. In the payment of the defalcations of the local agent, the general agent only discharged his own liability. He only complied with his own agreement, for the purpose of maintaining his position.

He had the general management of the affairs of the company; upon him rested the entire responsibility; to him alone did the company look for the payment of premiums, and the local agent was his appointee. He, therefore, acted under compulsion, in the payment of the premiums.

Such payment was the mere performance of a duty, the fulfillment of an agreement on the part of the general agent, and should not be regarded as an absolute payment of the bond. There was nothing voluntary about it, and we cannot presume that it was intended by the one party, or accepted by the other, as a satisfaction of the bond.

We think the payment should only be considered as a discharge of the general agent, and not a discharge of the bond. Such, evidently, was the intention. The contrary construction would make

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the act of the party operate directly opposite to the intention of the general agent, and to justice. The acceptance too, was not in satisfaction of the bond. This never could have entered into the minds of the parties. Looking at all the facts, the duty and contract of the principal agent to make regular monthly settlements, the fact that no allusion was made to the defalcation, and the strong probability that nothing was ever known by the company of the bond of the local agent, we must presume the payment of the premiums as intended and accepted entirely for the relief of the general agent, and not a release of the liability of the local agent.

The second objection, that notice was not given to the surety, cannot be maintained.

So far as the rights and remedies of the insurance company are concerned, appellants and Wallis are both principals. Hough was primarily liable for any defalcation, and the company was not compelled to sue Wallis, before resorting to its remedy against the surety. When two persons execute a bond, one as principal and the other as surety, one is equally bound to the obligee as the other.

In the cases to which reference has been made, there was a different relation between the parties. In *White v. Walker*, 31 Ill. 422, the question arose, as to the necessity of notice to a guarantor before the commencement of suit against him. The liability was secondary, dependent on the default of the lessee. Under such circumstances, this court held, that it was but reasonable the guarantor should have notice of the default before suit, so that he might make payment.

In the case of *Babcock v. Bryant*, 12 Pick. 133, the undertaking of the defendant was collateral only. The relation of guarantor and guarantee existed, and the court held, that in such case there must be reasonable notice.

In this case the surety did not agree to do something, upon the performance of some act of his principal. The undertaking of the surety was primary. He stipulated for no notice, but agreed to do a certain thing, in a certain specific event. This event, the failure of principal to pay over all moneys collected, might have become known to him. He could easily have obtained the requisite information. Ordinary inquiry would have afforded him a knowledge of the conduct of the principal. The default did not lie within the peculiar knowledge of the opposite party. In such cases no notice is necessary before suit. In *Orme v. Young*, 3 E. C. L. 84, the plaintiff sued upon a bond executed by his son and ten securities, for £22,000,

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payable by installments of £1,000 half yearly, until £9,000 should be paid, at which time the residue was to be paid. Default was made in the payment of the residue of the principal sum, and continued so until the principal became a bankrupt. No notice had been given to the sureties of this default.

GIBBS, Ch. J., in delivering the opinion of the court, said: "A neglect to give notice to the surety, that the debtor had made default, does not discharge him." See also, *Taylor v. Bank of Kentucky*, 3 J. J. Marsh. 564; *Pittsburg, Fort Wayne & Chicago Railroad Company v. Shaeffer*, 59 Penn. St. 350.

It was, however, error to render judgment on the bond without a surrender of the notes of Wallis. It is true that Raymond terms them "cash tickets;" but the form given in the record is that of an ordinary note for money.

It is wrong, in every view, to permit a creditor to retain notes, and also have judgment for the same indebtedness.

So far as appears from the record, these notes are still in the possession of Raymond, or he may have transferred them to third parties, and the debtor may be compelled to pay them.

They should be surrendered on the trial, or proof made that they had been given up, so that the debtor is released from his double liability.

If the notes had been received in actual payment of the defalcations, then the liability upon the bond is discharged. This fact should be inquired of by the jury.

The judgment is reversed and the cause remanded.

Judgment reversed.

TRUSTEES OF FIRST EVANGELICAL CHURCH, appellants, v. WALSH

(57 Ill. 363.)

Injunction — restraining invasion of burial places.

A court of chancery has jurisdiction to grant an injunction to restrain town officers from wrongfully laying out a highway through a cemetery.

APPEAL from the superior court of Chicago. The opinion states the case.

J. V. LeMoyne, for appellants.

Goudy & Chandler, for appellees.

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MCALLISTER, J. This was a bill for an injunction to restrain appellees, officers of the town of Lake View, in Cook county, from interfering with appellants' possession and use of certain cemetery grounds therein situate.

On the 20th of April, A. D. 1860, appellants obtained, by purchase and deed, of and from one Humphreys, a conveyance to them, in fee, of the north half of the north half of the east half of the north-west quarter of section 20, town 40 north, range 14 east of third principal meridian, excepting six acres on the south-east corner of the piece, previously sold, making fourteen acres conveyed. Appellants took possession, and soon after the conveyance inclosed the ground and devoted it to the uses of a cemetery, and have ever since continued such use of it. Afterwards and on the 9th of October, A. D. 1865, they also purchased and obtained the conveyance of one Gilbert Hubbard and wife, of a parcel of land constituting ten acres, and described in the deed as "All of block No. 4, of Laffin, Smith & Dyer's subdivision of the north-east quarter of section 20, town 40 north, range 14 east of third principal meridian, with the appurtenances," etc.

The plat of Laffin, Smith & Dyer's subdivision of the north-east quarter of section 20, was introduced in evidence. It purports to have been acknowledged by the proprietors on the 24th, and recorded on the 27th November, 1855; but it was not, nor is it claimed to have been, made in conformity with the statute as to the mode of laying out towns and making additions thereto. No statutory effect can, therefore, be accorded to the plat.

It appears by the evidence, that block 4 lies directly east of the first mentioned parcel purchased of Humphreys, and if a certain strip along the west line of block 4, designated on the plat as Gifford street, and forty feet wide, cannot be regarded as a highway, then it adjoins the other parcel on the east.

Assuming they did join, appellants, soon after their purchase of the block, united both pieces into one by inclosing them with a suitable fence, and dedicated the whole ground to public use as a graveyard. Grounds thus devoted were regarded by the civil law as "sacred, religious and holy," and belong to no individual. Cooper's Justinian, 69. And the civil law in this particular, is said by Bracton to be the common law, and it would be strange indeed that a system, based upon so accurate a theory of human nature as the common law is, should fail to recognize a sentiment so deeply seated in the

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human heart, and so universal in the human race, whether civilized or savage.

It appears that appellees, as commissioners and overseer of highways of the town, claiming the strip in question to be a public highway, Walsh, as overseer, and accompanied by a police officer, by the direction of the commissioners, just before the filing of this bill, proceeded, in the assertion of such claim, to take down, by force, the fence across the strip, both on the north and south sides of the inclosure, to effect an entrance into and through the grounds, while at the same time the solemn rites of burial were about to be performed within, and were thereby delayed for over an hour, and the clergyman officiating was threatened with arrest if any resistance was made; and now, without any disclaimer of the right asserted, appellees insist, that even if the right were ill-founded, the act was but a simple trespass, for which there is an adequate remedy at law, and chancery has no jurisdiction.

It has been decided by the supreme court of the United States, in a similar case, that there is no adequate remedy at law for such an invasion, and that chancery has jurisdiction. The right asserted in that case went to the whole grounds; here, it is to a part only, but that does not affect the question. It is upon the principle that burying places, laid out and consecrated to such use, become public immunities, or common privileges, and if the right asserted would, when carried into effect, disturb the enjoyment of those immunities or privileges, and the right itself be ill-founded, then, as such disturbance would be more than a private trespass — would be a public nuisance going to the irreparable injury of the congregations complaining — chancery has jurisdiction to restrain its commission, and to quiet the appellants in the possession and use of their cemetery. *Beatty et al. v. Kurtz et al.*, 2 Peters, 566, 584; *Smith v. Bangs et al.*, 15 Ill. 399.

What, we may ask, would be the measure of damages at law, for the wounded sensibilities of the living, in having the graves of kindred and loved ones blotted out and desecrated by common highway travel? The inadequacy of a remedy at law is too apparent to admit of argument.

[The remainder of the opinion is devoted to a consideration of the question, whether the strip in question, mentioned in the foregoing part of the opinion, was or was not a public highway. The court held it was not.]

Decree reversed.

FAULDS, plaintiff in error, v. YATES

(87 Ill. 412.)

Corporation — combination between stockholders to control.

Three persons, owning a majority of the stock of a corporation, entered into an agreement, as between themselves, to elect the officers of the company and to manage its affairs as they or a majority of them should determine. *Held*, that the agreement was not illegal or void as against public policy.

WRIT OF ERROR to the circuit court of Iroquois county. The opinion states the case.

Dent & Black and *Edward H. Brackett*, for plaintiff in error.

W. Bushnell and *J. C. Champlin*, for defendant in error.

THORNTON, J. The Chicago Carbon and Coal Company, a corporation organized under a special law, issued certain shares of stock. A majority of the shares were purchased by plaintiff in error. The company owned a large amount of lands, valuable for coal, and had leased them to one Kirkland until May 1, 1866, with the privilege of a renewal for three years, in consideration of fifteen cents per ton for each ton of coal mined, until the opening of certain new mines by the company. After that he was to pay \$5,000 per year as rent for the demised premises. Kirkland assigned this lease to Faulds, Yates and Bunn, and this transfer was approved and consented to by the company, by a resolution entered upon its minutes, on the 31st of January, 1866. They assumed, by an indorsement on the lease, all the responsibility and liability which Kirkland was subject to by virtue thereof.

On the 1st of February, 1866, Faulds, Yates and Bunn executed articles of copartnership, in which the stock owned by Faulds was valued at \$60,000, and Yates and Bunn agreed to purchase two-thirds of it for \$40,000, and Faulds was to superintend the mining operations, and Yates and Bunn to furnish two capable men to sell coal, and generally manage the financial affairs of the concern; and it was expressly understood that each party was to be equally interested in the business. These parties embarked their money, in equal

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proportions, in the purchase of this lease, for the purpose of prosecuting mining operations, and the development of the mineral resources of the Chicago and Carbon Coal Company. The written agreement constituted essentially a partnership. It was a voluntary contract, between persons, to place their money in a lawful business, and to share the profits and loss in equal proportions.

The shares of stock purchased by defendant in error were paid for, and after the formation of the partnership the mining operations commenced, and continued until December, 1866. During this time the defendant in error furnished to Faulds over \$19,000, which were used by him in carrying on the business. This amount was expended by him, and yet no profits were realized by Yates and Bunn; and Faulds failed to pay his share, or indeed any part, of the expenditures.

After the formation of the partnership, Faulds purchased the "Sanger tract" of land, as it is known in the record, for \$8,000, but represented to Yates and Bunn that he had paid for the same \$9,000; that this tract was essential to their successful operations; and induced them to purchase two-thirds of the tract at \$6,000, which they paid, but received no deed to the land. The agreement was, that a deed should be made.

In December, 1866, Faulds abandoned the work, and wholly failed to perform his part of the agreement, and soon after Yates and Bunn commenced their suit in chancery for a dissolution of the partnership, and an account and the conveyance to each of them of the undivided one-third of the "Sanger land."

The bill charges fraud and misrepresentation in regard to the sale of the shares of stock. The misrepresentation is fully proved, but was prior to the formation of the partnership. The representations, in regard to the value and cost of the stock, were proved to be untrue; but they were made, as recited in the written contract between the parties, before its execution.

It may be fairly deduced, from the evidence, that the "Sanger tract" was purchased by Faulds with the design that it should constitute a part of the partnership property.

The court below decreed that the plaintiff in error convey to each of the defendant in error the one undivided third of the "Sanger tract," and pay to them \$666.67, the excess paid by them for the Sanger land, and the one-third part of \$19,259.16, the amount advanced by defendant in error in the mining operations.

A reversal of this decree is asked for, upon the following grounds: 1st. That the agreement between the parties is void, as against public policy. 2d. That there can be no chancery jurisdiction arising out of the Sanger tract of land, and that there was full remedy at law. 3d. That the evidence does not sustain the allegations of fraud.

There were 1,300 shares of stock of the Chicago Carbon and Coal Company, not owned by Faulds, Yates and Bunn. They did, however, own more than one-half of the shares; and it was provided, in the agreement between them, that they would elect the directors of the company; that they would determine among themselves as to the officers and management of the company, and that if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote should be cast as a unit, so as to control the election.

It is contended that these parts of the agreement were intended for dishonest and fraudulent purposes, and were in conflict with the interests of the other stockholders, and absolutely void.

It should be remembered that the lease, by virtue of the assignment and renewal of which these parties obtained possession of the property, was made in 1863; and hence its terms and conditions were determined three years before Faulds, Yates and Bunn purchased any stock. The old board of directors approved the renewal of the lease, and then these parties, and two others, were elected directors.

The record wholly fails to disclose any injury to the other shareholders—any waste of the property; but, on the contrary, it appears that Bunn and Yates furnished for the improvement of the property over \$19,000. There was no fraud in the agreement which has been so bitterly assailed in the argument. There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons, owning a majority of the stock, have the unquestioned right to combine, and thus secure the board of directors and the management of the property. Corporations are governed by the republican principle, that the whole are bound by the acts of the majority, when the acts conform to the law of their creation.

The co-operation, then, of these parties, in the election of the officers of the company, and their agreement not to buy or sell stock except for their joint benefit, cannot properly be character-

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ized as dishonest and violative of the rights of others, and in contravention of public policy. If one man owned a majority of the stock he surely had the right to select the agents for its honest management. These three persons had formed a partnership for mining, under the lease of the company. They knew they must make large expenditures of money. Incompetent and unfriendly directors and officers might involve them in much trouble, heavy expense and useless litigation. They had a double interest to protect — their interests as shareholders, and their interests as lessees. It is strange that a man cannot, for honest purposes, unite with others in the protection and security of his property and rights without liability to the charge of fraud and iniquity.

This agreement was made between persons who had invested a large amount of capital in an enterprise somewhat perilous. As shrewd, skillful and prudent men, they were desirous of increasing the investment, and making the stock more valuable. Their interests were identical with the interests of the minority shareholders. They could not destroy the property of the company, for the lands were of immense value if the mineral resources failed. If they increased the value of their own stock, they also increased the value of all other stock. If they destroyed the stock of others, they also, by the same act, destroyed their own. It is absurd to suppose that a sane man will ruin himself for the mere pleasure of ruining others.

The agreement complained of was entered into by Faulds and his partners. The shareholders, whom he is so solicitous to defend and protect, have not complained. He cannot invoke their shield to fight imaginary wrongs. The transaction which he, through his counsel, denounces as fraudulent and nefarious, was conceived and consummated by him, as much as by his partners. Every motive which could influence a man for good should have prompted him to silence.

If this combination was fraudulent and intended for bad purposes, the stockholders who are in a minority, and who may have suffered, have ample redress. We prefer to listen to them, before any decision as to their wrongs.

The cases cited to sustain the position, that this agreement is void, are unlike the case at bar. In *Hawley v. Cramer*, 4 Cow. 717, it was held that a purchase by an attorney for three of his clients, was fraudulent as against the other two, who were absent;

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also, that an agreement between different persons, not to bid against each other, but to divide the profits, was against public policy.

In *Randall v. Howard*, 2 Black U. S. 585, it was decided that the law would not enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. In *Wheeler v. Sage*, 1 Wall. 518, the same general principle is declared, as in the the case of *Randall v. Howard*, *supra*.

The agreement in this case was not for the injury of the minority stockholders. It could not have been so intended, and we cannot perceive that it could so operate. The selection of proper officers, the prudent management of the coal mines, the careful sale and purchase of stock, as provided for in the agreement, together with the expenditure of money in the improvement of the property, must have resulted in benefits to all the stockholders, and not alone to the parties to the particular agreement.

A careful reading of the contract shows no hidden advantage intended, no fraud, no dishonesty. For aught which we can discover in the record, if Faulds had performed faithfully on his part, this litigation might have been avoided, and the partnership have prospered.

[The remainder of the opinion is unimportant.]

Decree reversed.

STURGES, appellant, v. KEITH.

(57 Ill. 451.)

Damages — measure of, for conversion of stock.

IN an action of trover for the conversion of stock, the measure of damages is the value of the stock at the time of the conversion, with interest from that time until the trial. (*See note*, p. 85.)

THIS was an action of trover brought in the circuit court of Cook county, by appellee against appellants, to recover for the alleged wrongful conversion of 250 shares of the common stock of the Chicago & Alton railroad company.

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It appears from the evidence that, in May, 1864, the appellants, Frank Sturges, Albert Sturges, George Sturges, Buckingham Sturges, and Shelton Sturges, were engaged as copartners in the business of banking, under the firm name of Solomon Sturges' Sons; that the appellant, William Sturges, was not a member of the firm, but a managing agent thereof; that appellee, being a customer of this banking house, and himself and partner being indebted to the same in the sum of about \$13,000, upon a gold transaction, in the month of May aforesaid brought to the bank certificates for 250 shares of the above-mentioned stock, and by an arrangement conducted exclusively between him and William Sturges, the stock was left in the bank, but whether as security for the indebtedness of appellee and partner to this banking house, or merely for safe keeping, is a fact as to which the evidence of the parties is conflicting. It, however, does appear, that at the time of leaving the stock and closing the arrangement in reference to it, appellee executed a power of attorney to the Sturges last named, authorizing him to sell and transfer the stock; and there is nothing in this record which discloses that appellee ever attempted, by any express act of revocation, or by giving instructions inconsistent with such power of attorney, to revoke the same, until about the 22d day of March, 1866, when he caused a demand in writing, for the return of the stock to him, to be served upon said William, and in July next thereafter commenced this suit against all the parties above named, for the wrongful conversion of the stock.

It further appears, by the evidence in the case, that in September, 1864, Albert and Buckingham Sturges bought out the other members of the firm, the latter then retiring therefrom, and the former continuing the business. And also that, in the latter part of January, 1865, William Sturges sold the stock in question; but it does not appear that any of the other defendants participated in the act, either by previous command or subsequent ratification, except the mere fact that the transaction was entered in the books of the firm, then composed of Albert and Buckingham Sturges only.

The court below instructed the jury, on behalf of the appellee, that, "if the plaintiff was the owner of 250 shares of the stock of the Chicago & Alton Railway Company, and deposited the same with the agent of the defendants in the usual course of business, either as a special deposit for safe keeping or as collateral security for an indebtedness, and such deposit was known to the defendants, the

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law implied a duty on their part to safely keep the stock ; and if the jury further believe, from the evidence, that said stock has been wrongfully converted, then the defendants are liable in this action, and no one of the defendants can shield himself from liability by reason of his withdrawal from the firm after said stock was deposited with their agent."

Walker & Dexter, and Higgins, Sweet & Quigg, for appellants.

Beckwith, Ayer & Kales, for appellee.

MCALLISTER, J. [After deciding that the above instruction was error, and that on the facts, trover would not lie against the retired members of the firm.] The only other question discussed in this case is the measure of damages, and the propriety of the instruction to the jury by the court below, on that subject, the substance of which was, that if the jury found the defendants guilty, then, inasmuch as the plaintiff had elected to take it, the measure of damages was the market value of the stock at the time of the trial, together with the cash dividends declared since February, 1865, and the jury were at liberty to allow interest on such dividends, at the rate of six per cent per annum, from the time of their respective payments by the railroad company.

It appears in the case that the stock was sold in January, 1865, for \$93 per share, which is claimed to have been its then market value. The demand was made for it by appellee in March, 1866. In July next thereafter this suit was commenced; but it was not tried until the October term, 1868, at which time the stock had advanced to \$151.50 per share. Under the instructions given, the jury found all the appellants guilty, and assessed appellee's damages at \$47,058.06, and must therefore have determined the value of the stock at the market price at the time of the trial.

Neither the last-mentioned instruction, nor any other, contained any hypothesis as to whether the suit had been brought within a reasonable time, or prosecuted with diligence, or whether from the evidence the conduct of appellants was fraudulent, or whether from the evidence there was good reason for believing that appellee procured the stock for a permanent investment, or would have kept it so as to have realized the price ruling at the time of the trial.

The rule of damages adopted by the circuit court must, therefore,

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have excluded all consideration of punitive or exemplary damages, and have been based upon the sole idea of indemnity to appellee, and virtually declares that the bailor may bring his suit at any time within the period of the statute of limitations, and then, upon the arbitrary presumption of law, that he originally obtained the stock for a permanent investment, and would have kept it until the time of the trial, he is allowed to elect to take the price at that time as the measure of damages, thus making the measure of damages depend upon presumptions that may be against the fact — the circumstance of venue, and the strategy of movement as to the time of trial instead of any fixed or definite rule.

In *Suydam v. Jenkins*, 3 Sandf. 626, the court, in an opinion delivered by DUER, J., and remarkable for its ability, research and thoroughness, says: "In trover, the general rule, both in England and the United States, undoubtedly is, that the current or market value of property at the time of conversion, with interest from that time until the trial, is the true measure of damages;" citing, in support of the proposition, a large number of cases, to which may be added: *Moody v. Whitney*, 38 Me. 174; *Walker v. Borland*, 21 Mo. 289-294; *Baltimore M. Ins. Co. v. Dalrymple*, 25 Md. 272; *Parks v. Boston*, 15 Pick. 198; Greenl. Ev., vol. 2, § 276; id., § 649; Sedg. on Dam. (margin p.) 481; *Keaggy v. Hite*, 12 Ill. 99; *Otter v. Williams*, 21 id. 118; *Yater v. Mullen*, 24 Ind. 277.

There can be no doubt but that the rule adopted by the learned circuit judge was based upon a supposed exception to the general rule of damages, on account of the subject-matter of the action being stocks. Such an exception to the general rule of damages in actions *ex contractu*, was made in England as early as 1802, in the case of *Shepherd, executor, etc., v. Johnson*, 2 East, 211. This case was a writ of inquiry to assess damages on a bond given by the defendant, conditioned that his co-obligor should replace a certain quantity of stock which the testator had lent him, and which was to have been replaced on the 1st of August, 1799. By the general rule of damages, the recovery would have been for the market value at or about the day it should have been delivered. But because it was stock, an exception was made to this general rule; and the stock having advanced, the court held the market value at the time of the trial was the proper rule of damages. Nothing short of that, it was thought, would afford complete indemnity to the plaintiff for the breach of the engagement, and thus this exception to the general

rule originated from a ground merely conjectural and speculative, viz.: that the plaintiff would have kept his stock so as to realize the price at the trial. From that time to 1824, the cases of *McArthur v. Seaforth*, 2 Taunt. 257; *Downes v. Back*, 1 Stark. 318, and *Harrison v. Harrison*, 1 Car. & P. 412, were decided, recognizing the same exception. In *Gainsford v. Carroll*, it was sought to apply the rule of the foregoing cases in an action of assumpsit for not delivering goods upon a particular day, but which had not been paid for; but the court said: "Those cases do not apply to the present. In the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether."

But in *Greening v. Wilkinson*, 1 Car. & P. 625 (tried in 1825), which was trover for East India Company's warrants for cotton, evidence was given that the cotton was worth six pence per pound on the day of the refusal to deliver it up, but at the time of the trial would be worth ten pence half-penny.

For the defendant it was contended that, on the authority of the case of *Mercer v. Jones*, 3 Camp. 477, the damages should be the value at the time of the conversion; but for the plaintiff, that it must be the price at the time of the verdict, in the same way as damages for the non-performance of an agreement to replace stock.

ABBOTT, C. J., said the case of *Mercer v. Jones* was hardly law, and that the amount of damages is for the jury, who may give the value at the time of the conversion, or at any subsequent time, in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained.

Mercer v. Jones, supra, was trover for a bill of exchange, and Lord ELLENBOROUGH said: "In trover, the rule is, that the plaintiff is entitled to damages equal to the value of the article converted, at the time of the conversion," and directed a verdict for the amount of the bill and the interest up to the time of the conversion. Although ABBOTT, C. J., declared that this case was hardly law, yet, in *Keaggy v. Hite, supra*, which was trover for a note and mortgage, this court, in announcing the rule of damages, said: "The plaintiff, if entitled to recover at all, is entitled to a verdict for the full amount due upon the note and mortgage at the time of the conversion," and this rule, which was precisely the same as that laid down by Lord ELLENBOROUGH in *Mercer v. Jones, supra*, was again approved by this court in *Otter v. Williams, supra*.

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It is true that, in the former case, Mr. Justice TRUMBULL, who delivered the opinion of the court, cited the case of *Cortelyou v. Lansing*, 2 Cal. Cas. 200, in support of the rule. It is difficult to understand why that case was cited for that purpose. That was an action of assumpsit, to recover the value of a depreciation note, which had been left with the defendant as a pledge for the security of a debt, but which had been wrongfully sold by the pledgee more than ten years before the demand and refusal. The court held that the demand and refusal did not show a cause of action, because the plaintiff did not show that, at the time of the demand, he was ready and willing to tender the amount of the debt; and citing the case of *Shepherd v. Johnson*, 2 East, 211, approvingly, further held that, although the demand and refusal did not constitute or afford evidence of the cause of action, but that the sale of the note ten years before did, yet the plaintiff was entitled to recover the value of the note at the time he chose to demand it. Though this case was decided twenty years before that of *Greening v. Wilkinson*, 1 Car. & P., *supra*, the rule of damages is the same as in the latter, and the latter repudiated that of *Mercer v. Jones*, which is the same this court adopted in *Keaggy v. Hite*, *supra*.

It is very manifest that this court, in the citation of *Cortelyou v. Lansing*, did not intend to adopt the rule of damages therein recognized.* Because the case in which it was cited was decided at the Mount Vernon term of December, 1850, and at the Springfield term in the same month the case of *Smith et al. v. Dunlap*, 12 Ill. 184, was decided; and in the well-considered opinion of the court, delivered by Chief Justice TREAT, the doctrine of *Shepherd, executor, v. Johnson*, 2 East; of *McArthur v. Seaforth*, 2 Taunt.; *Downes v. Back*, 1 Stark., and *Harrison v. Harrison*, 1 Car. & P., *supra*, recognizing this supposed exception to the general rule of damages, when the subject-matter of the action was stock, or the delivery of goods, the price of which had been prepaid, is expressly repudiated, and which doctrine, we believe, still remains under the repudiation of a

* NOTE BY THE ILLINOIS REPORTER.—On the argument of the case of *Barrow v. Paxton*, 5 Johns. 280, the counsel for the defendant in error cited the case of *Cortelyou v. Lansing*, when he was interrupted by Mr. Chief Justice KENT, who remarked: "That case was never decided by this court. It was argued once, and I had prepared the written opinion, which appears in the report of Mr. Caines; but the court directed a second argument, which, for some reason or other, was never brought on, so that no decision took place on the points raised in the cause. How my opinion got into print I do not know. It was probably lent to some of the bar, and a copy taken, which the reporter has erroneously published as the opinion of this court."

very strong if not prevailing current of American authorities. *Pinkerton v. Manchester & Lawrence R. R.*, 42 N. H. 424, and cases there cited; *Sluter et al. v. Wallbaum*, 45 Ill. 43.

A majority of the court are unwilling to give our adherence to this doctrine of exception to the general rule of damages, because the subject-matter of the action happens to be stock; because, if there were a just foundation for the distinction in the days of Mr. Justice GROSE and when *Shepherd v. Johnson* was decided, the changes of time and commerce have long since worn it away. It is a fact, and one to which we cannot shut our eyes, that within the last quarter of a century almost numberless private corporations have been brought into existence, whose stocks, real or fictitious, have inundated the country, and supplied both the means and the stimulus for the most active, reckless and corrupting speculations and practices of the age. These are encouraged by the fact that now and then, though the value of the franchise itself is the only capital, though it may be based upon lands, oil wells, mines, patent rights or railroad schemes, yet, by the development of the country, or some fortuitous circumstance, persons occasionally realize great fortunes in these operations. Stocks that cost the owner little or nothing now and then advance to par, and above. Suppose the owner of such stocks should pledge them when not worth ten cents on the dollar, and the pledgee convert them. They cost the owner little or nothing. Circumstances arise, however, which enhance their value. By delaying his suit, or the trial of it, until those circumstances have had their full effect, the plaintiff, by invoking the aid of the presumptions: 1st. That he had parted with his money for the stock; 2d. That he obtained the stock as a permanent investment; and, 3d. That it is to be presumed that he would have kept it until the time of the trial, can elect to take the market value at the time of trial, when each of these presumptions is as baseless as the fabric of a dream. Such a rule, instead of being general, fixed and certain, is merely speculative, conjectural, and dependent upon accidental circumstances.

In *Smith et al. v. Dunlap*, *supra*, this court said that, "legal rules ought to be general in their application, so far as to embrace all cases depending on the same principles." Believing that to be a sound maxim, a majority of the court adhere to the general, well-established rule in this State, viz.: That the proper measure of damages in an action of trover is the current market value of the property at the

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time of the conversion, with interest from the time until the trial, and recognize no exception where the property converted happens to be stocks.

Where the demand and refusal either constitute the conversion or afford presumptive evidence of it, it is no infringement of this rule to regard *that* as the time for estimating the value; and when the article converted is one which has no real market value, but its value is enhanced to the owner by personal or family considerations, then, from the necessity of the case, the rule of damages would be measurably within the discretion of the jury.

We think the evidence offered by the plaintiff, and excluded by the court, tending to show that the railroad company was about to, and did, increase the stock, and that owners of stock were, by its regulations, to have a certain *pro rata* of the new stock at reduced rates, was admissible—not to enable the plaintiff to recover the value of the new stock, as special damages, but as being a circumstance which would legitimately bear upon the question of the value of the stock converted. As in trover for a ship, the plaintiff sought to prove, as special damages, the freight she would have earned on the next voyage, but it was held by the court that such circumstance must be included in the value of the ship itself. Mayne on Dam. 213.

If the plaintiff had conceived that there was fraudulent misconduct on the part of the defendants, which called for exemplary damages, or if he could lay the foundation for special damages, the way was open to him to join special counts in case, when such misconduct would have been directly in issue. But we cannot, from any considerations of supposed hardship of the case, extend the action of trover beyond its legitimate scope, “for trover, though nominally an action of tort, is usually brought to establish a mere right of property, and does not, like trespass, admit of evidence of aggravation.” Sedg. on Dam., § 467.

For the errors indicated, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

NOTE.—In *Boylan v. Huguet*, 8 Nevada, 345, the court held that the measure of damages for the conversion of stock is the value of the property at the time of the conversion with interest from the conversion to the judgment, together with any special damage which may legitimately arise out of the matter in existence at the date of the tort; it further held, that the highest market value between the conversion and the trial was not the correct measure. In *Baker v. Drake*, decided by the New York court

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of appeals in October, 1878 (8 Alb. L. J. 840), which was an action for the conversion of stocks, it was held (overruling *Markham v. Jaudon*, 41 N. Y. 235), that the highest market price of the stock between the conversion and the trial is not the correct measure of damages. What the measure is, was not, however, directly stated. — RMP.

STEVENSON *et al.*, appellants, v. LOEHR.

(57 Ill. 302.)

Vendor and purchaser — incumbrance — Condemnation for railroad.

Where a contract is made for the sale of land, the vendor to give a warranty deed on payment of the purchase-money, and between the time of the contract and the making of the deed, a portion of the land is condemned for a railroad, damages for the taking of the land belong in equity to the purchaser, and he cannot treat such taking as an incumbrance, and recover therefor on the covenants in the deed.

ACTION brought by Anna B. Loehr against Adlai E. Stevenson and others upon a promissory note executed by the defendants to the plaintiff. Judgment was rendered in favor of the plaintiff for the amount of the note. The defendants appeal.

Stevenson & Ewing, and Hamilton Spencer, for appellants.

Weldon & Benjamin, for appellee.

LAWRENCE, C. J. We are of opinion, where a person having a perfect title to a tract of land sells it, giving a contract for a deed of general warranty to be made on final payment, and between the sale and making of the deed a portion of the premises is condemned, under the right of eminent domain, for a railway track, the incumbrance would not be one for which damages could be recovered in an action on the covenants in the deed. Although the legal title does not pass from the vendor by the contract of sale, he holds it from that time merely as security for the payment of the purchase-money. The purchaser becomes the equitable and substantial owner, subject only to the right of the vendor to the payment of the purchase-money. If allowed to take possession, as is almost universally the case in this State, the vendor cannot oust the

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purchaser so long as the latter complies with the terms of the contract, and the purchaser is liable for the taxes assessed after he takes possession. The relation of the parties is not substantially different from what it would have been if the vendor had given a deed and taken back a mortgage to secure the payment of the unpaid purchase-money, except that where only a contract is given, the vendor can insert terms reserving to himself a more efficient remedy in case of default in payment. Should he refuse to convey on payment, the purchaser, it is true, would have to file a bill in chancery to procure his deed, but where there are a deed and mortgage, he would have to file a bill to procure a satisfaction of the mortgage, if the vendor should refuse to cancel it.

In such cases, then, if the railway company, condemning a portion of the land, pays damages, they would belong, in equity, to the purchaser. It is true, if the security of the vendor would be impaired by the receipt of the damages by the purchaser, he might insist that they should not be paid to him until his security had been increased to that extent, and the purchaser would have a corresponding right to security, if about to be placed in jeopardy by their payment to the vendor. But the damages belong, in fact, to the purchaser, and if the vendor receives them he must hold them as trustee for the purchaser, to be accounted for when the purchase-money is paid. Suppose the land has doubled in value between the sale and the condemnation. Suppose it has been bought at \$100 per acre, and has risen to \$200, and the railway takes five acres and pays \$1,000. Here is a profit of \$500, and certainly no one would pretend that the vendor would be entitled to it. He could not, by remitting to the vendee the purchase-money at the rate of \$100 per acre, claim the right to receive the condemnation money at double that rate.

The condemnation of the land under the right of eminent domain is, in fact, for the purpose of the present question, a sale of it by the purchaser, for which the law secures to him, and he is supposed to receive, full compensation. It is in the nature of a forced sale, it is true, but the responsibility is not upon the vendor. All persons hold their lands subject to the exercise of this right of eminent domain, and it is difficult to see why one holding land under a contract of purchase, and obliged to yield a part of it by this forced sale to the State, or to persons clothed with the authority of the State, for full compensation, should have any more claim against his

vendor, on the covenants in a deed subsequently made, than he would have if he had made a private voluntary sale. If he has himself received the damages from the railway company, without objection on the part of the vendor, it would seem simply preposterous in him to claim, after he receives his deed, that his vendor should also respond to him upon the covenants, for the purchase-money of the same land. If, on the other hand, his vendor has received the damages, and refuses to account for them, the purchaser could certainly hold him responsible for them, or probably might, in the event of such refusal, have his option between an action for the damages, as money had and received for his use, or an action on the covenants in his deed.

If, at the condemnation of the land, the damages are not paid in money, but in special benefits to the land, there would be the same reason why the vendor should not be subjected to a suit, after he has made his deed, that there would have been if the purchaser had received for his own use the damages in money. In both cases he has received the consideration for the forced sale, and should not be permitted to demand it twice. A demand of that sort would, in all cases, be unjust; in the present case it is peculiarly so.

The question is here raised by way of defense to a suit brought by the vendor, Anna B. Loehr, upon a note given by the purchasers for the unpaid portion of the purchase-money, the deed having been made before it was paid in full, but subsequent to the making of the original contract. That bore date April 8, 1867. The deed was given July 31, 1867, and between these dates the railway company condemned the land. We say the defense in this case is peculiarly destitute of merit, for the agent of Mrs. Loehr saw the president of the coal company which purchased the land, about the time the railway commissioners were assessing damages, and was told by him the company would claim no damages. The agent claimed none for his mother, the vendor, and it was evidently considered by all parties that it would be an advantage, instead of an injury, to have the railway company run its line along the side of the tract, as the land in question, amounting to about two acres, was bought by the defendants for the purpose of raising coal, and they expected increased conveniences in shipping from having the track laid along the line of their land. Indeed several of the purchasers, who were sworn upon the trial, are candid enough to say

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that they would rather have the road as it is than not to have it at all.

The land, then, taken in this case, was paid for in special benefits, which inured to the defendants. It was paid for in this mode, by their virtual consent. They asked no damages, and expected none, from the railway, but when, after the lapse of two years, they are requested by the plaintiff to pay their note, they ask to be permitted to pay a large portion of it by setting up against her the very damages which have already been paid to them by the railway company, with their consent, in special benefits, and which benefits they were obliged, on the trial, to admit, so far exceeded the damages that they had been the gainers by the building of the road.

We are of opinion this judgment should be affirmed.

Judgment affirmed.

HEFNER, appellant, v. VANDOLAH.

(57 Ill. 520.)

Estoppel — forged note.

In an action on a promissory note, by an innocent holder for value, it was conceded that the defendant's signature thereto was a forgery, but plaintiff claimed that the defendant was estopped by his declarations and conduct, from denying the execution of the note. The note was payable one day after date. The acts relied on to create an estoppel were as follows: About a year after date of the note, plaintiff asked defendant if he was aware he held C.'s note with his name on it; to which defendant replied that he was, and that "he thought the best way was not to press C.; that if he was let alone he thought he would come out all right." C. was the forger of the note, and the one from whom plaintiff had received it. He was at the time of the above conversation in failing circumstances. *Held*, that defendant was not estopped from denying the execution of the note.

THIS was an action on a promissory note, purporting to have been signed by Warren Coman and Marston Hefner, payable to James Vandolah, the plaintiff. Hefner alone was served with process, and pleaded the general issue, and also filed a special plea denying the

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execution of the note. At the trial, judgment rendered for the plaintiff. Hefner appeals.

Williams & Burr, for appellant.

Weldon & Benjamin, for appellee.

SCOTT, J. It is conceded, that the signature to the note in controversy is not the genuine signature of appellant. The evidence abundantly establishes the fact that it is a forgery. The single question presented is, whether the appellant, by his declarations and conduct, is estopped from denying the execution of the note.

There can be no controversy about the facts established by the evidence. The note upon which the suit was brought bears date the 8th day of January, 1869, and purports to be signed by Warren Coman and the appellant, Marston Hefner. It was delivered to the appellee on or about the date of its execution, and was received by him in the usual course of business. The appellant and the appellee both reside in the neighborhood of Lexington, and both of them had been engaged in the stock business with Coman, either as partners or as joint operators, to a very considerable extent, previous to, and subsequent to the making of the note now in controversy. They were engaged in the same kind of operations, and their business necessarily threw them much together.

It is in evidence, that the appellee was at the house of the appellant, where Coman made his home, several times during the summer of 1869, to see Coman on his own business. Although the note was delivered to the appellee about the time it bears date, and was made payable one day after date, yet it does not appear he ever called the attention of the appellant to it until some time in December, 1869. There is not the slightest evidence the appellant had any knowledge of the existence of the note, previous to that interview in December. It cannot be said that any thing the appellant did induced the appellee to receive the note in the first instance, or induced him to hold it without instituting measures for its collection for that great length of time after its maturity.

The acts relied on to create an estoppel occurred in December, after the note had been in possession of the appellee for about eleven months. At this time, both parties had become suspicious of Coman, and were fearful he would break up. In a conversation about his

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affairs, which occurred in a bank in Lexington, where the parties casually met, the appellee asked the appellant if he was aware he held Coman's note with his name on it, to which the appellant replied that he was. The note was not present at that interview. There is but little conflict in the testimony of the parties as to what occurred at the interview in the bank. The appellant, however, insists, that when inquired of as to his knowledge of the note, he asked when the note was made, and on being informed, simply replied, that if the note was made then he must have signed it. This fact would not alter the law of the case. The appellant does not deny, that when he was asked if he was aware appellee held Coman's note with his name on it, he replied he was.

It is insisted, the appellee was misled to his injury by this declaration of the appellant, and was induced to sleep on his rights, and not to take any active measures to enforce the payment thereof, or even to secure his debt. It is apparent from the evidence, that Coman, at the time of the interview of the parties at the bank, was about to break up, and both parties were anxious to secure the amounts due them, or for which they were liable as the surety of Coman. It is admitted that appellant, at that interview, told the appellee he thought the best way was not to press Coman, and that if he was let alone, he thought he would come out all right. It is insisted on the part of the appellee, that this declaration was made in bad faith, and made for the purpose of throwing appellee off his guard, with a view on the part of the appellant to obtain a better opportunity to secure his own claims, or those for which he was liable. On the contrary, the appellant insists it was simply an expression of an opinion on his part as to the best course to be pursued by both parties in reference to their relations with Coman, and was made in good faith, and for no sinister purpose. These are the main facts and declarations of the appellant, relied on to create the estoppel.

There can be no doubt, that if a party makes a declaration, or does any act to induce another to do an act he would not otherwise do, or to invest his capital on the faith of such declaration or act, he will be estopped to deny the truth of his declaration, or the just effect of his act. Such is the reasonable and just rule of the law. When a party is interrogated concerning a transaction which affects the interests of another, if he remains silent or answers falsely, and if the other is misled thereby, such party will be held bound by his silence or his false declarations. Where a party is induced, by the acts

or the declarations of another, to do an act he would not otherwise do, or omit to do an act he would have done but for the conduct of such party, and injury results therefrom, the party who induced such action, or non-action, must be held responsible for the consequences. If we apply these just principles in their fullest force to this transaction, would the admissions of the appellant, and the advice he gave the appellee concerning the best course to be pursued with reference to Coman, be sufficient in law to estop him from denying the execution of the note? This is the true inquiry in this case. As we have said, there is no pretense that the appellee was induced, by any thing the appellant did or said, to take the note in the first instance. If he is now to be estopped from denying the execution of the note, and asserting the truth as against the appellee, it must be by the admissions made in the conversation in the bank, and the advice then given. No other acts are alleged, and none are proven.

The doctrine of estoppel *in pais* is to prevent injuries arising from acts or declarations which have been acted on in good faith, and which it would be inequitable to permit the party to retract. In order to create such an estoppel, the party estopped must have induced the other party to occupy a position he would not have occupied but for such acts and declarations. *Knoebel v. Kircher*, 33 Ill. 308.

The conduct and representations must be such as would ordinarily lead to the results complained of. An act or declaration consistent with good faith, the injurious result of which could not have been foreseen or anticipated by any ordinary forecast of mind, certainly ought not to operate as an estoppel, although injury may result therefrom to a third party.

Lord DENMAN, in *Pickard v. Sears*, 6 Adol. & El. 469, gave a very clear and accurate definition of this doctrine, where it is said: "The rule of law is clear, that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on the belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."

We are unable to discover in the evidence any act or declaration on the part of the appellant, the ordinary effect of which would have been to mislead the appellee to his injury, or which, in fact, did mislead him, or cause him to do, or omit to do, any thing that

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resulted in injury or loss. The evidence does not disclose that the appellee was placed in any different or worse position, by any thing that was said or done by the appellant, or by any admission he made, or by any advice that was given. The appellee himself does not testify he omitted to do any single act, or that he omitted to take any measures toward the collection or securing of his debt by reason of, or in consequence of, such admission or advice. There is nothing in the entire evidence that would warrant the appellee, under the circumstances, to fold his hands and do nothing toward the collection and the securing of the debt. He had reason to believe Coman was about to become bankrupt; that subject was thoroughly canvassed by the parties.

It is suggested, in argument, that the appellee knew the appellant was amply responsible for the debt, and relying on that fact, and the admissions made by the appellant, he was induced to make no effort to collect his debt. This fact cannot avail to aid the appellee's cause. He knew Coman had been in failing circumstances; that the note had been due in his hands from ten to eleven months; that, at most, appellant was only surety on the note, and good faith toward the appellant ought to have prompted him to make every possible effort to make or secure the debt out of the principal before he became utterly insolvent.

The doctrine of estoppel insisted upon concerns conscience and equity, and the party that would avail of it must himself have acted in good faith toward the party on whose conduct he relied, or it will not be held to constitute a bar to the assertion of the truth. *Preston v. Mann*, 25 Conn. 118.

We do not discover that the advice the appellant gave, concerning the course to be pursued with reference to Coman, caused the appellee to change his position in the least, or even caused him to omit any act he would have done but for that advice. There is nothing in the evidence to show but that the advice was given in the utmost good faith; but if it was not, and a sinister purpose could be imputed, still, if the appellee was not induced by such advice to change his position, or act differently from what he otherwise would have done, the appellant is not responsible. *Starr v. Fourtee*, 17 Md. 341.

The case of *Lancaster v. Baltzell*, 7 Gill & John. 468, is a stronger case than the one before us. The action in that case was by the indorsee, against the maker of a promissory note. The latter, when

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applied to by the plaintiff for payment, replied, it was all right; that he would show he was entitled to certain credits, and that he would then settle the note. The first indorsement, the name of the payee, was a forgery. It was held, these facts did not estop the maker from interposing that defense.

In *Morrison v. Weaver*, 16 Ind. 344, it was held, that where the maker was informed that the note had been already purchased, and promised the assignee to pay it, he was not estopped to contest its validity, on the ground that the promise did not induce the purchase.

The case of *The Bank v. Hazard*, 30 N. Y. 226, to which our attention has been called by the counsel for the appellee, is not in point on the question involved in this case.

The case of *Petrie v. Feeter*, 21 Wend. 172, is not illustrative of the one we are considering. That case simply holds, that where a maker of a note is present when the note is about to be purchased by a third party, for a valuable consideration, and acknowledges his liability therefor, he is estopped to deny he made the admission in ignorance of the true state of facts. The case states a correct principle of law, but the facts are totally different from those presented in this record, and the principle, therefore, can have no application. If it appeared that, by the admission insisted upon, the appellee had been induced to receive the note in the first instance, the case would be in point, and would be authority.

We have carefully examined every case to which our attention has been called by the counsel for the appellee, and we do not find any of them to be in conflict with the views we have here expressed. So far as the principles contained in any of those cases have any application to the facts of this case, they fully sustain the views announced.

After a careful consideration of the whole facts in the record, we are of opinion that the finding of the court was contrary to the law and the evidence, and for the reasons indicated the judgment must be reversed and the cause remanded.

Judgment reversed.

Gates v. Hackethal.

GATES, appellant, v. HACKETHAL .

(57 Ill. 534.)

Usury — consideration — agreement for extension of time.

The maker of a note for a certain sum, payable in currency, with legal interest in order to obtain an extension of time, gave a new note for the amount, payable in gold coin, or in currency with the premium on gold, at a certain date. *Held*, that the second note was usurious.

ACTION on a promissory note. The opinion states the case.

D. Gillespie, for appellants.

Dale & Burnett, for appellee.

WALKER, J. It appears that appellant Gates, in February, 1864, sold to appellee a farm for the sum of \$10,000, payable \$400 in hand, \$5,600 on the first of April following, \$2,000 at one year from the 24th of February, 1864, and \$2,000 two years from that date, the deferred payments to bear ten per cent interest, and to be secured by deed of trust. The first payment was made, the notes and deed of trust were executed and delivered according to the agreement, and Gates executed a conveyance of the farm.

When the first note fell due, appellee, having been disappointed in getting his money from Germany, was unable to meet it, and it was agreed that Gates should not sell the farm under the deed of trust, and appellee was to pay him in gold, or its value on the first day of April, 1864, in United States treasury notes; and appellee then gave to Gates another note for \$5,600 in coin, or in treasury notes with the premium that coin was worth at that date; in the following August, appellee paid the note first falling due, with interest, and it was surrendered up to him.

In December, 1866, appellee paid to appellant Gates, \$4,750 which appellee claims he directed to be paid on the two notes of \$2,000 each, but that appellant Gates retained \$1,200 as a premium on gold, on the first day of April, 1864, which he claimed was due to him on the note falling due on that date, and then applied the remainder of the sum then paid, on the two notes he still held. Appellant, on the other hand, claims, that when the payment was made in Decem-

ber, 1866, it was through the sons of appellee, and that he then settled with them, and they agreed the money should be applied in the manner he adopted, and they agreed that \$1,200 should be the amount of the premium on the gold. This \$1,200 produces this controversy.

It is claimed by Gates that it was paid in consideration of an extension of time for the payment of the first note. On the other hand, it is insisted that it was an usurious transaction, and that there was no other consideration for the agreement. It seems to be clear that the \$5,600, and the agreement, as it is called, of April 1st, 1864, are for one and the same sum of money; about this, there is no dispute; and it would seem that when the note with interest was paid in full, and it was surrendered up, the whole debt was paid and discharged. The note or agreement of April 1st being for the same debt, and not made, or intended, to be a discharge of the other, was only collateral to it, and when the principal was paid the presumption would be that the collateral would be discharged.

It appears, from all the evidence, there was no claim for any sum, as premium, when the note was delivered up to the maker. It seems to us, that as the note was secured and the agreement was not, Gates would then, as he did subsequently, when he says a new note was offered for the last note falling due, have refused to release his security for the \$1,200, if he regarded it as due him. Why did he not, as he did when the last payment was made, deduct the \$1,200 and credit the balance? He says it was because one of the sons of appellee promised to pay it when his father's money came from Germany. He was, as he says, unwilling to receive a new note subsequently because it would have been without security, and he fails to explain why he was willing to permit the \$1,200 to remain unsecured.

The note of February 24th and the note of April 1st being for the same indebtedness, given at different times, the question is presented as to what was the consideration of the latter. Gates says it was for an extension of time to pay the money on the note already due. We fail to find any agreement proved that any specific time was agreed upon. From the evidence contained in the record, we fail to perceive there was an agreement that would have prevented Gates from suing on the note of February, at any time. The note of April 1st specifies no time for payment, and being a promise generally, the law would presume it was payable on demand. This

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being the legal effect of the note, it was not based on any consideration. It in nowise changed the rights or liabilities of the parties. Had Gates, on delivery of the new note to him, at once demanded its payment, it would have thereby become due. There was not, therefore, an extension of the time of payment, and hence no new consideration to support the agreement. It was usurious, as it attempted to give appellant more than the legal rate of interest. Or, if we take the other explanation of Gates, that his object was to avoid loss by the depreciation of treasury notes after the maturity of the note and before its payment, we fail to perceive any consideration to support the new agreement. It appears that the sale was made for treasury notes, and the price of the land was fixed and agreed upon with reference to payment in such funds. This being the case, and appellant still treating the first note as being so payable, the effect was to render the note payable in a different and more valuable medium — to increase its value — because, when the new note was made, it is conceded that treasury notes, at their par value, would have discharged the debt, and this was sometime subsequent to its maturity. Again, had treasury notes appreciated to the standard of gold before payment was made under the new note, appellee was required to pay the amount of treasury notes that gold would have purchased on the first of April. This was an effort to change the contract essentially, and without any consideration, as we have seen. If valid, it would have changed the character of the contract, given Gates new and valuable rights not possessed under the original note, and without any benefit to appellee. We are, therefore, of opinion that the new note was not binding, and conferred no rights.

It follows, that the account was correctly stated in the court below, and the decree is right, and must be affirmed.

Decree affirmed.

The Insurance Co. of North America v. Hope.

**THE INSURANCE COMPANY OF NORTH AMERICA, appellant, v.
HOPE.**

(88 Ill. 75.)

Fire insurance. Proof of loss. Repairs by company.

A policy of fire insurance provided that, in case of loss, the company might restore or repair the property, within a reasonable time, by giving notice of its intentions so to do, within thirty days after the receipt of proof of loss. *Held*, that to authorize the company to repair, notice of their intention so to do must be served within the thirty days specified, and that, in the absence of any provision in the policy to the contrary, delivery of proof of loss to the local agent was delivery to the company for all the purposes of the policy. (*See note, p. 51.*)

ACTION of assumpsit on a policy of insurance. The jury rendered a verdict for plaintiff of \$385.75. Judgment was rendered on the verdict, and the defendant appealed.

William S. Field, for appellant.

Charles P. Wise and Alex. W. Hope, for appellee.

SCOTT, J. This was an action commenced by the appellee against the appellant, on a policy of insurance. The property was destroyed by fire, and the company failing to pay the loss, this suit was instituted to recover the damages which, it is alleged, the appellee sustained.

The defense relied on is, that the company elected to, and did, repair the property insured after the injury occasioned by the fire. The policy contained a clause, that it should be optional with the company to repair, rebuild or replace the property, loss or damage with other like kind, within a reasonable time, by giving notice of its intention so to do, within thirty days after the receipt of proof of loss.

It is in proof that the company did elect to repair the property insured, and did do work upon it, for which it paid the carpenter who did the work the sum of \$150. There is great conflict in the evidence as to the fact whether the building, after the work was completed by the company, was in as good condition as before the fire. The building was an old one, and the weight of evidence seems

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to be that it was so nearly destroyed by the fire, that the work and materials used in making the repairs were a useless expenditure.

The appellee insists that the company did not make its election to repair the property within the thirty days, the period fixed by the provisions of the policy in which the company had the right to make such election.

The repairs that were made by the company were not made with the express, or even the implied, consent of the assured. It is in evidence that he protested when he was first notified that the company intended to repair the property against any work being expended thereon, and placed his objections on two grounds: First, that the building was so badly injured that it could not be repaired to any advantage; and, second, that the company did not make its election within thirty days.

It is therefore a material inquiry, whether the company did make its election to repair the property, within thirty days after the receipt of proof of loss, and so notified the assured.

The right of the company to replace or repair the property insured, in case of loss, is created by the provisions of the policy, and if the company does not make its election in apt time, and give the assured notice, the right to so build or repair does not exist. And, in the event that the company does such work outside of the terms of the policy, without the consent of the assured, it will be in its own wrong, and no deduction can be made from the amount of the loss on account of such work. If the election to replace or repair the property is not made within the period fixed by the express terms of the policy, and notice given, the right of action becomes complete in the assured, and no subsequent election on the part of the company, not assented to by the assured, will divest that right of action.

The proofs of loss, in this instant, were furnished to the local agent on the 6th day of May, and the evidence establishes the fact, that the notice to repair the property was not given until about the middle of June, a period of more than thirty days having elapsed.

It is insisted that it is not a sufficient compliance with the terms of the policy, to deliver the proofs of loss to the local agent, and that the time in this instance would not begin to run until such proofs were delivered to the general agent of the company at Chicago. We find no such condition in the policy. In the absence of any provision to the contrary, the delivery of proofs of loss to the local agent will be taken and considered as a delivery to the company,

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for all the purposes of the policy, and if the local agent fails to forward the same to the home office, or to the office of the general agent, as required by the usage of its business, the negligence cannot be charged to the assured. *Herron v. Peoria Marine and Fire Ins. Co.*, 28 Ill. 235.

The objection that the proofs of loss, when presented on the 6th day of May, were not in conformity to the conditions of the policy, does not aid the cause of the appellant. Only a general objection was made by the agent when the proofs were presented, and no specific defect was suggested or pointed out. The rule is, that if the proofs of loss are insufficient when presented, it is the duty of the company, or agent, to give notice to the assured of the specific defect, and if the company or agent fail to point out wherein the proofs are defective, such proof, notwithstanding a general objection, will be deemed sufficient. *The Great Western Ins. Co. v. Staaden*, 26 Ill. 365.

The proofs of loss were not, in fact, forwarded to the office of the general agent at Chicago until the 25th day of May, but that was the fault of the local agent, and not of the assured, and the company can derive no benefit from the negligence of its own agent. The assured ought not to be prejudiced or delayed in the collection of his loss by reason of any negligence of the local agent to discharge his full duty to the company.

We are of opinion that the notice of election on the part of the company to repair the property on which the loss occurred was not given in apt time.

It does not appear that the assured ever consented that the company might make the repairs, and without such consent, if the election to repair was not made in the proper time, the company had no right to do the work. The expenditure of work and materials in making the repairs, was the voluntary and unauthorized act of the company, and no deduction can be made from the amount of the loss occasioned by the fire, on account of such work.

The instructions given at the request of the appellee are not so variant from the views here expressed as to mislead the jury. The instructions refused for appellant do not state the law correctly, and were therefore properly refused by the court.

It is insisted that the verdict is against the weight of evidence. There is certainly a very great conflict in the evidence as to the value of the property covered by the policy. Some of the witnesses placed its value much higher than the amount of the verdict, and

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others much lower. It was the province of the jury to weigh the evidence and arrive at a just conclusion. After a careful consideration of the whole evidence, we cannot say that the verdict is so clearly wrong that it ought to be disturbed by the appellate court. In all such cases, where the evidence is conflicting, on questions of mere value of property, about which men differ so widely in their judgments, we must rely on the verdict of the jury, as presenting the true and just conclusion to be drawn from the evidence.

Perceiving no substantial error in the record, the judgment must be affirmed.

Judgment affirmed.

NOTE. — Insurers have the right to rebuild or repair only where it is specially provided for in the policy. *Wallace v. Ins. Co.*, 4 La. 289; *Commonwealth Ins. Co. v. Lennett*, 37 Penn. St. 205.

If no time is fixed within which the insurers are to elect whether they will repair or not, they must elect within a reasonable time. *Haskins v. Hamilton Mut. Fire Ins. Co.*, 5 Gray, 422. What is a reasonable time is ordinarily a question for the jury. In *Sutherland v. Society of the Sun Fire Ins. Co.*, 14 Cases in Court of Sessions, N. S., 775 (Scotch), a policy on a stationer's stock gave the company the option to pay or re-instate. The fire occurred April 13; the statement of loss was filed April 23, and on the 25d of May, after a variety of negotiations for a settlement, the company elected to re-instate. *Held*, that the election was in time.

Where the insurer elects in accordance with the policy to re-instate, and is proceeding to do so, and the municipal authorities cause the building to be taken down as dangerous, the insurer is not thereby relieved from liability, but must either re-instate or pay the damages for not doing it. *Brown v. Royal Ins. Co.*, 1 Ell. & Ell. 853. So, where a wooden building situated within the fire limits of Detroit was injured by fire, and by the ordinances of that city could not be repaired without the consent of the common council, which was refused. The building was insured for \$2,000, and the policy contained a clause that in case of loss or damage to the property, it should be optional with the company to rebuild or repair the building within a reasonable time. The cost of repairing the building would be much less than the amount of the insurance, but without leave to repair, the building, which before the fire was worth \$4,000, would be worth less than \$1,000. *Held*, that the insured was entitled to recover the whole insurance, and was not limited to such sum as would cover the cost of repair. *Brady v. North Western Ins. Co.*, 11 Mich. 425. But if the assured refuse permission to rebuild, after due notice of election, he loses his right of action. *Beals v. Home Ins. Co.*, 33 N. Y. 522.

Where the insurers elect to rebuild or replace, in accordance with the terms of the policy, the contract of insurance is converted into a building contract. *Ib.*; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429. When premises are insured in two companies for distinct sums, and both companies unite in notifying the insured of their election to rebuild, they become liable to a joint or several action for a breach of the contract to rebuild. *Ib.*

Enlargement of the time of performance, waiver of performance by the assured, accord and satisfaction, or tender of performance after the accrual by election of the liability to repair, are good defenses to an action on the policy, and parol evidence is admissible to sustain them. *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170.

If the company do not elect to replace, indemnity for the loss and not the cost to replace is the measure of damage. *Com. Ins. Co. v. Lennett*, 37 Penn. St. 205. But if the company elects to rebuild, and is proceeding to do it in an improper manner, a court of equity will not interfere, but will leave the insured to his action for damages as on a building contract. *Home Ins. Co. v. Thompson*, 1 Upper Canada Err. & App. 247.— **REP.**

CITY OF CLINTON, appellant, v. PHILLIPS.

58 Ill. 103.)

Municipal corporation — ordinance — interference with private business. Intoxicating liquors.

A city ordinance for regulating the sale of intoxicating liquors provided that druggists might sell such liquors for certain purposes, but required them, under a heavy penalty, to furnish a quarter-yearly statement verified by their own and their clerks' and servants' affidavits, showing the kind and quantity of liquor sold, when and to whom sold, etc. In a prosecution under this ordinance to recover the penalty for failing to furnish the statement, *held*, that the city council had no power to pass the ordinance; that it was unreasonable and oppressive and an invasion of the sanctity of private business. (*See note, p. 54.*)

APPEAL from the circuit court of Dewitt county. The opinion states the case.

E. H. Palmer, for appellant.

Moore & Warner, for appellee.

THORNTON, J. Appellee was arrested and prosecuted under an ordinance of the city of Clinton. He was found not guilty. The city prosecutes this appeal.

The city council adopted an ordinance, prohibiting the sale of intoxicating liquors, of any kind whatever, and affixed penalties for its violation.

It was agreed that the prosecution was for a violation of section 5 of this ordinance; that appellee was a druggist, engaged in business in the city, and as such had, for more than one year, sold spirituous liquors for medical purposes; but that he had not reported such sales to the city council, as the section required him to do.

The following is the section referred to :

"This ordinance shall not apply to the sale of any spirituous, vinous, malt, fermented, mixed or intoxicating liquors, kept by any established apothecary, druggist, his agents, clerks or servants, for sacramental, chemical, mechanical or medical purposes, provided the same are sold in good faith, under the prescription of a physi-

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cian, except in extreme cases, and then said druggists shall be satisfied beyond a reasonable doubt that the person or persons applying for such liquors, or purchasing the same for sacramental, chemical, mechanical or medicinal purposes, will use the same in good faith for one of those purposes; and provided, further, that said apothecary or druggist shall furnish to the city clerk, within ten days after the expiration of each quarter of the year, after this ordinance is in force, a statement, in writing, of all spirituous, vinous, malt, fermented or intoxicating liquors sold by him, his agents, clerks or servants, during the previous quarter, mentioning therein the kind and quality, when and to whom sold, and upon whose prescription or assurance. Said statement shall be subscribed and sworn to by such apothecary or druggist, and each and every agent, clerk or servant in his employ, each making oath for himself and not for the other, that said statement is true in substance and in fact. Every apothecary or druggist neglecting or failing to furnish said statement shall, upon conviction thereof, forfeit and pay to the city council of the city of Clinton the sum of not less than fifty nor more than two hundred dollars for every offense.

“Passed and approved April 13, 1867.”

Errors enough have been assigned, and points made, to afford opportunity to write a volume upon the powers of the legislature and of a city government. This court has often decided as to the power of the legislature, over the sale and traffic in intoxicating liquors, and the right to confer it upon municipal corporations.

We propose to discuss one question only: Had the city council the power to enact section five of the ordinance? The solution of this in the negative, is decisive of the case.

The penalty annexed is not for the sale of spirituous liquors. This is expressly permitted to druggists, for sacramental, chemical, mechanical and medical purposes. It is merely for a failure to report, quarter-yearly, the kind and quantity sold for such purposes, when and to whom sold, and on whose prescription or assurance. This report must be verified by the affidavit of the druggist, and of every clerk and servant in his employ.

Under this section, it is no offense to sell spirituous liquors for the purposes indicated. Neither is it one to sell without the prescription of a physician, nor without having ascertained, beyond a reasonable doubt, the object of the purchaser. The only offense is the neglect to furnish a detailed statement of his business.

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The section is suspicious in the spirit, and excessively stringent in its requirements. It permits the sale, and then imposes the most odious conditions. A mere venial omission is tortured into a grave offense, punishable with a heavy penalty. The private citizen, invested with no public office or employment, should not be subjected to such inquisition.

All men have a right to the secure enjoyment of property, and to be protected in their houses, papers and possessions against unreasonable searches. This section is an invasion of the sanctity of private business and ought not to be tolerated.

There was no power to enact it, and the judgment must be affirmed.

Judgment affirmed.

NOTE. — It has been frequently held that ordinances of municipal corporations must be reasonable. See *Mayor v. Winfield*, 8 Humph. 767; *Waters v. Leech*, 8 Ark. 140; *Kip v. Patterson*, 3 Dutch. 298; *Fisher v. Harriaburgh*, 2 Grant C. 281; *Commonwealth v. Robertson*, 5 Cush. 438; *Commonwealth v. Steffee*, 7 Bush, 161; *Clason v. Milwaukee*, 30 Wis. 316; *State v. Freeman*, 88 N. H. 426; *Dunham v. Rochester*, 5 Cow. 462.

An ordinance must not be oppressive. In *Commissioners v. Gas Co.*, 12 Penn. St. 312, a municipal corporation passed two ordinances in relation to a gas company — one prohibiting it from opening the paved streets from December to March, for the purpose of laying gas mains, and the other prohibiting the company from opening the streets at any time for the purpose of laying pipes from the mains to the sides of the street. The court held the latter ordinance oppressive and void. So, in *Mayor v. Winfield*, 8 Humph. 767, an ordinance providing for the arrest, imprisonment and fine of all free negroes who might be found in the streets after ten o'clock at night was held to be void. — REP.

 REAPER CITY INSURANCE COMPANY, appellants, v. BRENNAN.

(58 Ill. 153.)

Fire insurance — condition as to title to property.

A policy of fire insurance provided that "if the interest of the insured to the property be any other than the entire, unconditional and sole ownership of the property," it must be so represented to the company and expressed in the policy. Plaintiff effected an insurance on property which had at the time been sold on a judgment and execution against him, but the twelve months allowed to redeem had not elapsed. *Held*, that the non-disclosure of the execution sale avoided the policy.

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ACTION on a policy of insurance, brought by Brennan against the Reaper City Insurance Company. Judgment was rendered in favor of the plaintiff, from which the defendant appealed.

J. O. & O. L. Conkling, for appellant.

Harnden & Orendorff, for appellee.

LAWRENCE, C. J. This is an action on a policy of insurance. At the time the insurance was effected, the property had been sold on a judgment and execution against the assured, but the twelve months allowed for redemption had not expired. It is insisted the non-disclosure of this sale avoids the policy, by virtue of the following clause therein:

“If the property to be insured be held in trust or on commission, or be a leasehold interest or equity of redemption, or if the interest of the insured to the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the insured, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void.”

We must hold this defense valid. It cannot truthfully be said that the assured had, at the date of the insurance, “the entire, unconditional and sole ownership of the property.” On the contrary, the purchaser at the sheriff’s sale, although he had not acquired a complete title, either legal or equitable, as held in *Phillips v. Demoss*, 14 Ill. 412, had certainly acquired an interest in the land to the extent of his bid, which would, in a few months, ripen into a title unless redeemed. With this outstanding and paramount interest vested in another, the title of the assured was not “entire, unconditional and sole.”

The judgment must be reversed and the cause remanded.

Judgment reversed.

GREGORY, appellant, v. KING.

(53 Ill. 122.)

Illegal contracts — wager as to result of election in another State.

Plaintiff and defendant made a wager as to the result of a presidential election in another State, and deposited the money with a stakeholder. The plaintiff lost, and the stakeholder paid the money to the defendant. In an action to recover the money back, *held*, (1) that the wager was against public policy and void; (2) that the plaintiff could not recover back the money. (*See note, p. 58.*)

ACTION by King to recover back money wagered on an election in Pennsylvania, and paid to Gregory by the stakeholder. The plaintiff had judgment in the court below, from which the defendant appealed.

Oscar A. De Louw, for appellant.

Morrison & Whitlock, for appellee.

THORNTON, J. The parties to this suit wagered \$100 each, upon the result of the presidential election in Pennsylvania, in 1864.

The money was deposited with a stakeholder, and, after the election, was paid to appellant.

Appellee brought suit to recover it back, alleging that it was paid in consequence of false representations.

There is no proof of fraud or improper means used to obtain possession of the money.

If the wager was void, it cannot be recovered.

This court decided, in *Morgan v. Pettit*, 3 Scam. 529, that a wager between two citizens in this State, upon the result of an election in the State of Kentucky, was not illegal. To the same effect is the case of *Smith v. Smith*, 21 Ill. 244.

The reason given by the court for the decision in 3 Scam. is, "that the bet was made between citizens of this State, residing out of the State where the election is to transpire, and under such circumstances as preclude them from exercising any dangerous or controlling influence over the result."

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In the case under consideration, the wager was made a month or two prior to the election.

By our system of railroads and telegraphs, an extensive country has been brought closely together. A rapid passage, by the power of steam, makes Pennsylvania and Illinois near neighbors. Hence, if the inducements exist, the citizens of one State can almost as easily control the result of an election in one State as in another.

But we propose to take a broader view of the question involved. We assume that the wager between the parties was against sound policy and the best interests of the whole country. A presidential election rouses the public mind, and excites more attention than all of our elections. Every man is deeply concerned as to the result. The very existence of our system of government may depend upon it. Whether the wager be made upon the result in one State or another, the feelings are alike enlisted, the action of the parties alike prompted by an interest in the hazard.

Courts of justice should not encourage such wagers, by affording aid to either party. The law ought not to sanction gambling upon the result of popular elections. They should be free and pure. The elector should not be influenced by any hope of gain or fear of loss. In *Vischer v. Yates*, 11 Johns. 21, Chief Justice KENT lays down the following principle, which we adopt: "When we consider the importance of popular elections to the constitution and liberties of this country, and that the value of the right depends upon the independence, moderation, discretion and purity with which it is exercised, we cannot but cherish a decision which declares gambling upon such elections to be illegal, as being founded in the clearest and most incontestable principles of public policy."

The presidential election occurs on the same day in every State in the Union. The issue is of general concern. Each citizen, in each State, has a common interest in the maintenance of free government and constitutional liberty. The wager is equally immoral, is equally pernicious in its influence, whether upon the result in the State in which the parties reside or in a different one.

In one of the cases cited in 3 Scam., *supra* (*Allen v. Hearn*, 1 Term, 56), the wager was between two voters, as to the event of an election of a member of parliament, before the opening of the poll. It was decided to be illegal, upon the ground that it was corrupt and against the fundamental principles of the British constitution, and that it was a gambling contract and of dangerous tendency.

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Among us, where the whole power of the government is returned periodically to the people, the elective franchise should be preserved from all corrupting influences.

The majority of the court hold, that the wager in this case was against public policy and void.

We also hold, that it would be against probity and conscience to allow appellee to recover it back.

The cases referred to, and all others in conflict with this opinion, are overruled.

The judgment is reversed and the cause remanded.

Judgment reversed.

NOTE. — A wager contract is void if it be against public policy, equally as if it contravene a positive law. *Mount v. Watts*, 7 Johns. 424; *Bunn v. Baker*, 4 id. 426. In the latter case, wagers as to the result of an election, were held to be against public policy. That action was against a stakeholder by the winner to recover the money deposited on a wager as to the result of an election. One of the parties to the wager had already voted when the bet was made, but the other had not. The court held that the plaintiff could not recover. That case was followed and approved in *Lansing v. Lansing*, 8 Johns. 454. In that case the bet was made after the polls closed, on the event of the election for governor, and the action was on a negotiable note made by the loser and deposited with the stakeholder and afterward delivered to the winner and by him indorsed to the plaintiff after its maturity. A judgment for the plaintiff was reversed.

Vischer v. Yates, 11 Johns. 28, cited in the principal case, was reversed by the court of errors (*Yates v. Foot*, 12 Johns. 1), but not on the ground that election wagers are legal. The plaintiff, as principal, had deposited with his agent money to be staked on the event of an approaching election for governor, and the agent made a bet, and the money was deposited with the defendant as stakeholder. The agent lost and his principal brought the action to recover the money of the stakeholder, the money not having been paid over to the winner. The supreme court held that the action could be maintained, but the court of errors held otherwise, on the ground that the payment to the depositary was voluntary, the hazard had ceased, and the event was known, and that so far as the parties had performed, the performance ought to stand. To the same effect is *Johnston v. Russell*, 37 Cal. 670.

Since the decision in *Yates v. Foot*, however, the Revised Statutes (1 R. S. 602) have declared all wagers unlawful, and have given a right of action against a stakeholder "Whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not."

The invalidity of wagers on elections was also held in *Denniston v. Cook*, 12 Johns. 376; *Rust v. Gott*, 9 Cow. 169; *Brush v. Keeler*, 5 Wend. 250; *Like v. Thompson*, 8 Barb. 815.

In *McAllister v. Hoffman*, 16 Serg. & R. 147, it was held that money bet on an election and deposited with a stakeholder, who, after the event of the election is known, has notice not to pay it over to the winner but pays it, notwithstanding, may be recovered back from the winner, and to the same effect is *McKee v. Morrill*, 11 Cush. 357. In *Ball v. Gilbert*, 12 Metc. 397, it was decided that money in the hands of the depositary on an election wager is liable to trustee process in behalf of the creditors of either principal. The subject of election wagers was very fully discussed in that case by SHAW, C. J.

In the following cases also, bets on the result of elections have been held void at common law as against public policy. *Lloyd v. Seisenring*, 7 Watts, 294; *Wagoner v. Snyder*, id. 343; *Wroth v. Johnson*, 4 Harr. & McH. 234; *Laval v. Myers*, 1 Bailey, 426; *Smyth v. Masters*, 2 Brown, 182; *Hickerson v. Benson*, 8 Mo. 8; *Russell v. Pyland*, 2

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Humph. 131; *Wheeler v. Spencer*, 15 Conn. 28; *Foreman v. Hardwick*, 10 Ala. 316; *Turton v. Baker*, 18 Verm. 9; *Macht v. Moore*, 2 Gratt. 257.

Where the stakeholder has paid over the money to the winner, before notice or demand by the loser, he is exonerated. *Perkins v. Eaton*, 8 N. H. 152; *McCullam v. Gourley* 8 Johns. 147; *Livingston v. Woolan*, 1 Nott & McC. 178. But if, before paying it over, the loser has demanded a return of the money, or has notified the stakeholder not to pay it over to the winner, the loser can recover it of the stakeholder, even though the latter has paid it over after such demand or notice. *Wilkinson v. Touley*, 18 Minn. 200; 10 Am. Rep. 120, and cases cited.—RSP.

GARTSIDE, appellant, v. OUTLEY.

(58 Ill. 210.)

Mortgage—leases of mortgaged premises—entry of mortgages—revival of tenancy.

Where property has been leased subsequent to execution of a mortgage thereon, the mortgagee, on entry for condition broken, may treat the tenant as a trespasser, and bring ejectment, even without notice; but if the mortgagee receives rent from the tenant the relation of landlord and tenant will be thereby created between them. The mere receipt of rent, however, will not revive the tenancy for the entire unexpired term of the lease, but only from year to year.

EJECTMENT by Outley and others against Gartside. The plaintiff had judgment in the court below and the defendant appealed. The opinion states the case.

Wiley & Parker, and *W. H. Underwood*, for appellants.

Gustavus Kärner, for appellees.

SCOTT, J. This is an action of ejectment, brought by the appellees to recover the possession of certain coal lands described in the declaration. They claim to be assignees of John A. Twiss, and seek to obtain possession under a lease formerly executed to him by the railroad company.

On the 9th day of May, 1856, the Belleville & Illinoistown Railroad Company executed to Twiss a lease, or grant, of the lands in controversy, for an indefinite period, with leave and permission to take, under certain conditions specified in the grant, all the coal contained in said lands. The lease contained mutual covenants,

and also a provision of forfeiture in case of non-compliance on the part of the lessee.

In March, 1853, the Belleville & Illinoistown Railroad Company executed to Marshall O. Roberts and others a deed of trust upon all the property of the company, including the lands leased to Twiss, to secure the payment of the first mortgage bonds issued by the company.

In May, 1855, the railroad company executed to John Wilkinson another deed of trust on the same property, to secure the second mortgage bonds issued by the company.

These several conveyances were placed on record in the proper office, and whatever interest the lessee or his assignees acquired under the lease and the several assignments, were taken with notice of the prior rights of the mortgagees.

In October, 1856, the Belleville & Illinoistown Railroad Company, and the Terre Haute, Alton & St. Louis Railroad Company, were consolidated under the name of the latter company, the consolidated company succeeding to all the property and franchises, and assuming all the obligations of the former companies.

At a subsequent period, the consolidated company having failed to pay the interest as it became due on the bonds secured by the deeds of trust of 1853 and 1855, the road, together with all the property of the company, was surrendered to William D. Griswold for the benefit of the trustees. The surrender took place in the early part of 1860, and from that time on Griswold continued to operate the road for the benefit of the trustees, until 1862, when the deeds of trust were foreclosed in the United States court for the southern district of Illinois, and a sale of the mortgaged property was had in pursuance of the decree of that court. Subsequently the purchasers of that sale were, by a special act of the legislature, incorporated under the name of the St. Louis, Alton & Terre Haute Railroad Company, which company now holds the fee simple title to the mines in controversy.

It will be borne in mind, that at the date the present owners of the land became the purchasers at the sale under the decree of the circuit court of the United States, neither Twiss nor any of his assignees were in possession of the premises. The lease and the several assignments, however, were of record in the proper office, and to that extent, but no farther, they had notice of the rights of the lessee and of the assignees, whatever they might be. Previous

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to that sale, the lease had been declared forfeited by Griswold, acting in behalf of the trustees, either lawfully or unlawfully, and possession had been taken, and a new tenant of the company placed in charge.

It is a controverted fact in the case, whether the lease had been rightfully declared forfeited for non-compliance with its terms by the lessee or assignees, prior to the surrender in February, 1860. The right of Twiss to make the surrender is also questioned, and it is insisted that it was made for a fraudulent purpose, and through the corrupt use of money.

We are not inclined to attach much importance to these controverted facts, and for that reason we shall not inquire whether the lease was in fact forfeited for non-compliance, or whether Twiss had any lawful authority to make a surrender of the mines, or what motives may have influenced his mind in that regard.

In the view that we have taken of the case, there is one question that is conclusive of the rights of the appellees under the lease. The lease granted to Twiss was for no definite period, but was to run so long as there was coal to mine. The only limit to its duration was in the clause which provided for a forfeiture in case of non-compliance with its terms, if we except the further fact that it would expire by its own limitation when the coal was exhausted.

It may be assumed as an admitted fact that Griswold, after he took possession of the property of the company, in behalf of the trustees under the mortgage, did receive bank rents of the lessee in possession. It is not doubted that the lease, being subsequent to the mortgage, could have no force against the rights of the mortgagees.

It is insisted, however, that inasmuch as Griswold, acting in behalf of the trustees, after entry for non-payment of the mortgage indebtedness, did receive bank rents of the lessee in possession, that fact would set up the lease as against the mortgagees, and those claiming under them, for the entire period which the lease had to run. This is the controlling question in the case.

It is in the power of the mortgagee, on entry for condition broken, where the property has been leased subsequent to the making of the mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice, or the mortgagee may elect to recognize the lessee as his tenant. The authorities all agree in holding, where the mortgagee has entered for condition broken, and

received rents of the tenant, that the relation of landlord and tenant will be created between the parties. The single act of demanding rent has been held not to be sufficient for that purpose. There must be some distinct act on the part of the mortgagee that manifests the intention to recognize the lessee as his tenant. The question of the time for which it will be considered that the tenancy is created by the fact that the mortgagee received rents of the lessee, whether for the entire period of the unexpired lease, or for only a shorter period, is a question of more difficulty of solution. The generally received doctrine seems to be, that the receipt of rents by the mortgagee will only create a tenancy from year to year, in analogy to the rule where the tenant holds over after the expiration of the lease. The doctrine proceeds upon the ground that the lease is inoperative as to the mortgagee, and is terminated by the act of entry. The rule of the common law is well established, that the mortgagor cannot, without the consent of the mortgagee, execute a lease that will prevail against the mortgagee, and it has been uniformly held that the entry of the mortgagee puts an end to the lease. *Keech v. Hall*, 1 Doug. 2.

Upon principle, therefore, something more is required than the mere receipt of rents from the lessee, to make valid the lease for the unexpired term, as against the mortgagee. In *Doe ex dem. Hughes v. Buckner*, 8 Carr. & Payne, 566, PATTERSON, J., held that if the mortgagee, instead of turning out the lessee, elects to take him as his tenant, the mortgagee does not, thereby, set up the tenancy for the entire unexpired term of the lease, but only from year to year.

The case of *Thunder v. Belcher*, 3 East, 449, holds the same doctrine, that the receipt of rents will only create a tenancy from year to year, as between the lessee and the mortgagee. We find that these cases have been quoted by numerous text writers, and the doctrine established does not seem to be questioned. Hilliard on Mortgages, p. 235, § 231; Taylor on Landlord and Tenant, § 120; Platt on Leases, p. 171.

We have been referred to no English or American case that holds the doctrine insisted upon by the counsel for the appellees, that the mere receipt of rents from the lessee, by the mortgagee, after entry for condition broken, will set up the lease for the unexpired time. We do not see how such a doctrine can be supported on principle. It is more in harmony with the analogies of our law, to hold that it

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will require a special agreement, to make valid and to effectuate the extension of a lease executed by the mortgagor.

We can conceive that a case can arise where the mortgagee might be estopped by his acts from contesting the rights of the lessee under the lease. If, for instance, the mortgagee should continue to receive the rents for any considerable period, and in the mean time suffer the tenant to make extensive permanent improvements under the terms of the lease, he will be held to have consented to the extension of the lease. Under such circumstances, to permit the mortgagee to retract his consent would be to practice a fraud on the lessee, and the doctrine of estoppel *in pais* would justly apply. In case the mortgagee should acquiesce in the making of improvements by the lessee, and the expenditure of money, whereby the value of the estate would be greatly increased, it would be inequitable to permit him to retract and contest the lease, or the rights of the lessee under it.

It does not appear, in this case, that any improvements of a permanent character were made on the premises by the lessee, or the assignees, after the payment of bank rents to the mortgagees in possession. Indeed, the evidence shows that there were no improvements of any considerable value made, subsequent to the payment of rents. The doctrine of estoppel *in pais*, insisted upon by the counsel for the appellees, can have no application to the facts of the case.

It is very doubtful, in any view that can be taken, whether the appellees can assert any rights as against the present owners of the premises in controversy. Neither the lessee nor any of the assignees were in possession of the premises at the date of their purchase under the decree of the United States court. It is true that the lease and the several assignments were upon record in the proper office, but there was no one in possession claiming any rights under the lease. The lessee himself surrendered the possession of the premises, and the assignees acquiesced in the possession of the mortgagees for a period of two years prior to the sale, and it is not until after the expiration of five years, and after the present owners had made permanent and valuable improvements, that they attempt to assert their rights under the lease in this action. It is not pretended that the present owners ever received any bank rents, or that they, in any manner, ever recognized any rights in the lessee or assignees, under the lease, or the several assignments. We are at .

a loss to see upon what principle the appellees can assert any rights under the lease, as against the present owners and their tenants.

It is insisted that the decree and sale under which the present owners claim are irregular and void. The sale cannot be thus attacked in a collateral proceeding. If the appellees would avail of error, if any exists, in the foreclosure of the mortgages or deeds of trust, or the sale thereunder, it must be in some direct proceeding instituted for that purpose.

It is insisted that the instrument entered into by the parties is not a lease; that it conveys a higher estate. The counsel does not define the nature of the estate which he insists is created, except to indicate that the grant is in the nature of a "servitude," to which the company's land was subjected for an indefinite period. We think the fair construction to be given to that instrument is, that it is in the nature of a lease, and creates only the relation of lessor and lessee. If, however, it can be said that it conveys the fee in the land, with a perpetual reservation of rent, we do not see how that view could aid the claim of the appellees. It would appear to us that if such an estate passed, the foreclosure of mortgages, and the sale thereunder, would terminate absolutely and forever all rights of the grantee and his assignees.

In the event that such a construction could be given to the instrument, a very grave question would arise, whether the trustee in possession, by any act of his, could incumber the estate to the prejudice of the *cestui que trust*. This question has not been argued by counsel, but upon first impression we should be inclined to hold that he could not.

In no view that we have been able to take of the case, can the appellees recover against the present owners of the land and their tenants, and if another trial shall be had on substantially the same evidence, it will be the duty of the court to instruct the jury to find for the appellants. *Storing v. Onley*, 44 Ill. 123.

This view of the law renders it unnecessary to discuss the other questions raised by the counsel on the record.

It was error in the court not to award a new trial, and the judgment must be reversed and the cause remanded.

Judgment reversed.

White v. County of Bond.

WHITE, administrator, appellant, v. COUNTY OF BOND.

(58 Ill. 297.)

Municipal corporation. County — liability of for injuries from defective bridges.

A county is not liable to a private action for injuries occasioned by reason of the neglect of its officers to keep a bridge in repair. (*See note, p. 66.*)

ACTION on the case. The opinion states the facts.

David Gillespie, for appellants.

Hay, Greene & Littler, and John M. Palmer, Jr., for appellee.

BRESE, J. This was an action on the case in the Bond circuit court by the administrators of Stephen D. White, deceased, against the county of Bond, for wrongful neglect in keeping a bridge over the east fork of Shoal creek in good repair, by means of which the deceased lost his life.

To the declaration there was a general demurrer by the defendant, which the court sustained, and rendered judgment against the plaintiffs for costs, to be paid in due course of administration.

To reverse this judgment, the plaintiffs appeal.

This case must be governed by the *Town of Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652, and *Bussell, Administrator, v. The Town of Steuben*, 57 Ill. 35, decided on the authority of *Hedges v. County of Madison*, 6 id. 567, and other cases there cited, and overruling the case of *South Ottawa v. Foster*, 20 id. 296.

In the case first cited, it was held that such corporations as counties and towns were not liable to a private action, at the suit of a party injured by a neglect of its officers to perform a corporate duty, unless such action was given by statute for the violation. The distinction was recognized between those corporations created for their own benefit, and the incorporated inhabitants of a district by statute invested with particular powers without their consent.

In regard to municipal corporations, acting under special charters, the privileges conferred are held to be a consideration for the duties which the charter imposes, and for the performance of which, like

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individuals, they must be responsible in an action. Neither counties nor towns become such at the special request of the people. Not so with those municipal corporations organized under special charters, or by the general law. Such organizations are the result of the action of the people, impelled thereto by considerations affecting, more or less, their private interests. They are solicited, while the former are imposed without the consent of the people.

In addition to what was said in *The Town of Waltham v. Kemper, supra*, considerations suggested by the counsel for appellee here might have been urged with great propriety. He urges the comparatively small territorial limits of an incorporated city or town, rendering frequent meetings of municipal delegates easy, the permanency of their executive officers, who are capable of receiving all notices and acting promptly on all contingencies, and to keep themselves fully advised as to the condition of all public streets and highways within their jurisdiction, all which enable such corporate authorities to perform duties which would be very difficult, if not impossible, to quasi corporations, such as towns and counties whose meetings are "few and far between," and who have no regular force in constant attendance, to discharge all necessary duties and receive all notices. With such there is no representative body capable of acting at all times, nor is there any officer or other person, under the control of the county authorities, whose duty it is to give them notice of defects in highways and bridges.

We think these are important considerations, and add force to the reasons usually given, why such corporations should not be liable to a private action for neglect of duty.

This case is identical in principle with *Hedges v. The County of Madison, supra*, and with the other cases cited, and, in conformity therewith, this judgment must be affirmed.

Judgment affirmed.

NOTE.—In respect to quasi corporations, as towns and counties, it has been frequently decided in this country that there is no common-law obligation resting upon them to keep the highways and bridges, within their limits, in repair; and even where the legislature imposes upon such corporations the duty to make and repair roads and bridges most of the cases treat this as a public and not a corporate duty, and hold that the town or county is not liable, civilly, in its corporate capacity for neglect of the duty, unless an action be expressly given by statute. See Dill. Mun. Corp., § 785 (2d ed.), where the question is very fully and ably discussed. See, also, *Mpwer v. Leicester*, 9 Mass. 247; *Sutton v. Board*, 41 Miss. 236; *Hoffman v. St. Joaquin Co.*, 21 Cal. 426; *Hedges v. Madison Co.*, 1 Gilm. 567; *Larkin v. Saginaw Co.*, 11 Mich. 88; *Scales v. Chattahoochee Co.*, 41 Ga. 235; *Treadwell v. Commissioners*, 11 Ohio St. 190; *Freeholders v. Strader*, 8 Harr 106; *Bray v. Wallingford*, 20 Conn. 416.

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Under a statute providing that an action may be maintained against a county for injury to the rights of a person arising from some act or omission of the county, an action was upheld against a county for the neglect of the overseer of roads to repair a defective bridge, the county having the power to appoint and remove the overseers. *McCalla v. Multnomah Co.*, 8 Oregon, 424.

In New York, where the highways are in charge of the towns, it was held that a town is not liable for an injury occasioned by its highway officers suffering a public highway to get out of repair and in a ruinous and unsafe condition, and that even a vote of the electors of a town to pay damages arising from the defects of a road would not sustain an action against the town for such damages. *Morey v. Town of Newfane*, 8 Barb. 645; see, also, *Town of Galen v. Clyde*, 27 id. 551; *Lorillard v. Town of Monroe*, 11 N. Y. 302. — REP.

KINGSBURY, appellant, v. BURNSIDE.

BUCKNER, appellant, v. KINGSBURY.

(58 Ill. 310.)

Deed, delivery of. Trust, creation of. Statute of frauds. Parol evidence.

B. executed a deed of certain property conveying it to K. and sent it to his (B.'s) agent to be recorded, which was done. There was no pecuniary consideration for the deed, nor was there any previous arrangement or communication between B. and K. on the subject; nor had K. any knowledge of the execution of the deed; nor did he or his authorized agent ever have possession of it. Subsequently B. informed K. of the deed and K. assents orally to receive it. *Held*, that such assent made the deed operative from the time the assent was given.

B. holding the legal title to real property, but upon a secret parol trust for his wife and her brother K., executed a deed thereof, absolute in form, in which his wife joined, to K., the brother, without any pecuniary consideration and without the knowledge or consent of K. B. caused the deed to be recorded. Subsequently B. said to K., "The property of your sister has been deeded to you, and I want you to look after her interests, and see that she has her property." K. replied, "all right," or "very well," or words to that effect. Afterward K., in a letter to his mother, and also in a document intended to be a will, incidentally recognized the conveyance as a trust. *Held*, that the assent of K. to the conveyance, in connection with the words of B. informing K. thereof, created an express trust in favor of B.'s wife, and that the subsequent letter and document were sufficient evidence of the trust within the statute of frauds.

Held, also, that the existence of a trust having been established by a writing, parol evidence of conversations concerning the trust, between the trustee and brother, referred to in the writing, was admissible for the purpose of describing or defining what was meant by the writing.

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THESE cases arose upon a bill in chancery, filed on behalf of an infant, Henry W. Kingsbury, to have declared void the will of his father, Henry W. Kingsbury, and a cross-bill filed by Simon Buckner and wife, to have a trust declared and executed. The court below dismissed both bills, and the complainants in both bills appealed.

The following facts appeared :

On the 26th day of June, 1856, Julius J. B. Kingsbury, being seized in fee of the real estate described in the pleadings, and situate in Cook county, in the State of Illinois, died at the city of Washington, D. C., intestate, leaving him surviving his widow, Jane C. Kingsbury, and two children, viz., Mary J. and Henry W. Kingsbury. In May, 1860, the daughter, Mary, married Simon B. Buckner. The son, Henry W., was about nineteen years of age at the death of his father. In 1861 he became an officer in the U. S. army. Buckner had been the confidential friend of Julius J. B. Kingsbury and had managed his estate, under a power of attorney, from 1855 until 1858, and in 1855, the latter conveyed to the former, by a deed, absolute on its face, but really upon a secret parol trust, a strip of land of great value situated in Chicago and being part of the land known as the "Kingsbury tract," the legal title to which remained in Buckner until May, 1861.

Aside from her interest in the property in question as heir at law of Julius J. B. Kingsbury, Mrs. Buckner had no property, except a small interest in property situated in Waterbury, Conn. The relations between Buckner and wife and Henry W. Kingsbury were always of a confidential and affectionate character.

In May, 1861, at Louisville, Kentucky, where they resided, Buckner and wife joined in a deed, absolute in form, to Henry W. Kingsbury, of all their right, title and interest in the "Kingsbury tract," and in other property in Chicago.

The deed stated the consideration to be one dollar "and the natural love we bear our brother," but there was in fact no pecuniary consideration for the deed. The said deed was executed in the absence of the grantee and without his knowledge and without any previous arrangement or communication between the parties on the subject. Buckner sent the deed to his agent at Chicago, Mitchell, with directions to place it on record, which was done on the 17th of May, 1861. The deed appeared never to have been in the hands or pos-

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session of the grantee or his authorized agent, but to have remained in the recorder's office.

In July, 1861, while Buckner and Henry W. Kingsbury were together in the city of Washington, Buckner said: "By the way, the property of your sister has been deeded to you, and I want you to look after her interests, and see that she has her property." To which Kingsbury replied, "all right," or "very well," or words to that effect. This appears to have been the first information Kingsbury had of the deed. The interest of Mrs. Buckner in the property covered by the deed was, at the time, of the value of \$500,000.

In August or September, 1861, Henry W. Kingsbury and his mother, Mrs. Jane C. Kingsbury, met at Old Lynn, Conn., and she testifies that she then asked him in regard to his sister's property; whether it had been turned over to him (Henry), and told him that Simon had told her so. That he replied: "That is so; but don't look concerned, it is only turned over to me for safe-keeping; it will be restored to her." After this conversation, and on the 23d day of October, 1861, Henry W. wrote a letter to his mother, at Arlington, Va., and bearing that date, which she received, in which he said: "I spent all the morning with Burnside yesterday. He states, as I told you, that Simon had made over the Chicago property, that was held in his name, to me. A new power of attorney is, therefore, necessary for you and myself. We made one out. I signed it. Burnside will send it to you. I send you a copy for your own keeping, and keep one for myself." This letter was closed and signed by Henry W. Kingsbury, thus: "Believe me, dear mother, your affectionate Henry." The person referred to as "Simon," was Mr. Buckner.

She testifies that between the time of the conversation with him at Old Lynn, in August or September, 1861, above stated, and the receipt of this letter, she had not seen him, written to him or received any letter from him.

The power of attorney referred to in this letter is dated October 22, 1861, and was executed by Henry W. to Ambrose E. Burnside, appointing him attorney "to transact and conduct the business of the Kingsbury estate of Chicago," etc.

At the time the letter was written and the power of attorney made to Burnside, Buckner was in the army of the so-called Confederate States, and his wife within its military lines, they having gone there September 16, 1861, and at the same time Henry W.

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Kingsbury was first lieutenant in the fifth regiment of artillery, and was in the service of the Union army, at Arlington, Va.

On the 5th day of December, 1861, Henry W. Kingsbury married Eva McLean Taylor, and, with his wife, visited his mother at Old Lynn, Conn., arriving there, as the latter testified, on the 9th, and leaving on the 11th, same month. That during that visit, and on the 10th day of December, the mother again referred to the subject of Mrs. Buckner's share in her father's estate, and she testifies that "he then made the same remarks, that the property would all be restored to her." Witness then asked him "who was to see to it?" He replied: "If I am taken away, and General Burnside lives, he will see to it for you that Mary's property is restored to her." He said: "I am going to make my will; I am going to give you (witness) \$20,000 to do what you please with at your death, I mean mine, out of my property, and not my sister's." He said "he hoped the war would soon close, and Mary would come home and attend to her own property." This was the last time witness saw him.

It further appears, that on the 25th of March, 1862, Henry W. Kingsbury, at Fortress Monroe, Va., and while in the military service, there wrote in his own hand and executed the following instrument in writing:

"Expecting soon to start upon a military expedition, where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane O. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Ill., left by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Conn., and, in addition thereto, five thousand dollars, which I trust he will expend in completing his education.

"The remainder of my property, of every description, I leave to my devoted wife Eva. I desire, moreover, that the provisions of this will may be so carried out that the yearly income of my wife, for her own personal support, shall never be less than two thousand dollars (\$2,000)."

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"As executors I name General Ambrose E. Burnside, of Rhode Island, and Captain John Taylor, Com. Dept. U. S. Army.

"Signed at FORTRESS MONROE, VA., March 25, 1862.

**"HENRY W. KINGSBURY,
"1st Lt. 5th Regt. Artillery, U. S. Army."**

The above instrument was left with John Taylor.

On the 17th of September, 1862, Henry W. Kingsbury was mortally wounded at the battle of Antietam, and died the day following.

In December following, Eva, the widow of Henry W. Kingsbury, gave birth to a male child, the plaintiff in one of these suits, who was named Henry W. Kingsbury. In 1865, Mrs. Eva Kingsbury married Albert G. Lawrence. Mrs. Kingsbury was advised that the will of Henry W. Kingsbury was not executed in accordance with the laws of Illinois, and was not provable there.

In 1869, General Burnside, named in the will as one of the executors, succeeded in getting possession of the will, and it was, upon his petition, admitted to probate in Alexandria, Va., and an authenticated copy thereof was subsequently ordered to be and was recorded in Cook county, Ill. The bill of Henry W. Kingsbury, infant, was filed to set aside such will as a cloud upon his title.

Beckwith, Ayer & Kales, for Henry W. Kingsbury.

Goudy & Chandler, for Mary K. Buckner and others.

MCALLISTER, J. The first point which claims the consideration of the court is, whether the deed from Buckner and wife to Henry W. Kingsbury was ever so far legally executed as to become operative.

It was signed, sealed and acknowledged at Louisville, Kentucky, May 15, 1861, in the absence and without the knowledge or assent of Kingsbury; then sent to Chicago by Buckner to Mitchell, a stranger to the transaction, not authorized by the grantee to receive it, but with the simple direction from Buckner to have it recorded. It was placed on file on the 17th of May, and there remained until after the death of Kingsbury, occurring in September, 1862. There is no evidence that Kingsbury ever had it in his possession, or even saw it, but it is quite conclusive the other way.

"It is necessary to the validity of a deed that there be a grantee

willing to accept it. It is a contract, a parting with property by the grantor, and an acceptance thereof by the grantee." *Jackson v. Bodle*, 20 Johns. 184.

In *Jackson v. Dunlap*, 1 Johns. Cas. 114, the court said: "It is also essential to the legal operation of a deed that the grantee assents to receive it. It cannot be imposed on him, and there can be no delivery without acceptance."

This rule is expressly recognized in *Herbert v. Herbert*, Breese, 360, where the court say: "It is also held to be essential to the legal operation of the deed that the grantee assents to receive it, and there can be no delivery without acceptance." In this case the authorities are quoted as establishing this general doctrine: "It may be delivered to the party himself, to whom it is made, or to any other person by sufficient authority from him." So far, it is entirely consistent with the principle of the rule above enunciated; but it proceeds: "Or it may be delivered to a stranger, for and in behalf, and to the use of him to whom it is made without authority; but if it be delivered to a stranger without any such declaration, unless it be delivered as an *escrow*, it seems that it is not a sufficient delivery," citing *Jackson v. Phipps*, 12 Johns. 419; 1 Shep. Touch. 57, 58; 2 Black. Com. 307; Viner's Ab. 27, § 52.

Taken literally, the latter branch of the rule seems to be inconsistent with the principle of that above enunciated. Because so taken, it imports that when a deed is made to one without authority, and is delivered to a stranger for the use of him for whom it is made, with a declaration by the grantor to that effect, then there is a delivery which makes the deed operative, whether the grantee assent or accept it or not.

If this be so, it therefore follows, that although a deed be a contract, as was said by SPENCER, Chief Justice, in *Jackson v. Bodle*, *supra*, that is, a parting with property by the grantor and an acceptance thereof by the grantee, yet such contract may be completed by the acts and words of a grantor alone, without the assent of the grantee. Suppose it be one from which the grantee derives no benefit, but it subjects him to a duty, the performance of a trust, can he be obligated to the performance of such trust by the mere act of delivery and declaration of purpose by the grantor to an unauthorized stranger? If it be said that such act and words may bind the grantor, though perhaps not the grantee, then we have an instance of a contract where only one of the parties to it is bound,

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without any condition to that effect contained in it — where the grantor is estopped by deed and the grantee not estopped.

It must be that the rule under consideration cannot be taken literally; but that the principle underlying it is, after all, assent, presumptive or actual, on the part of the grantee; that he must take the deed, and thus ratify the previous acts or then existing circumstances, or the deed of such a nature that the assent will be presumed, in the absence of proof to the contrary. Suppose the stranger to whom the delivery is made offer the deed to the grantee, and this is his first knowledge of it, has he no option? May he not refuse to accept it? Would tender to the grantee and refusal be equivalent to acceptance? But suppose the stranger should not offer it, and the grantee, without knowledge of, or assent to it, should die, would the property embraced go to his heirs, charged, perhaps, with a trust? There seem to be authorities which go this extent. *Taw v. Bury*, 2 Dyer, 167 *b*, and *Alford and Lea's Case*, 2 Leon. 110, are of the class. Lord COKE, in *Butler v. Baker*, 3 Coke, 26 *b*, makes an explanation of the doctrine thus: "If A make an obligation to B, and deliver it to C to the use of B, this is the deed of A presently; but if C offer it to B, then B may refuse *in pais*, and thereby the obligation will lose its force." *Taw's Case*.

KENT, in speaking of *Taw v. Bury*, and *Alford and Lea's Case*, says: "It appears difficult to sustain the law of these cases, unless on the ground of the subsequent possession of the deed by the grantee and its relation back. Lord COKE in *Butler and Baker's Case*, 3 Coke, 26 *b*, explains this point by admitting that B may refuse the deed *in pais* when offered, and then the obligation will lose its force." 4 Kent's Com. 455, note *b*.

This examination of the grounds upon which a legal delivery rests is made for the purpose of ascertaining when, if ever, and under what circumstances, the deed in question became operative. That a deed takes effect only from the time of delivery, with a few exceptions, where the necessities of the case require the application of the doctrine of relation, there can be no doubt.

Was the act of sending it to Mitchell a delivery? He was a stranger and had no authority from the grantee to receive it. There was no declaration that it was delivered to him for the grantee's use; nor was it delivered as an *escrow*. But it was sent merely to have it filed for record. He was, therefore, a mere medium through which it was to pass to the hands of the recorder. The act was no

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more of a delivery, in the legal sense, than placing it in possession of the carrier, to be conveyed from Louisville to Chicago — than if Buckner had taken it himself to the recorder to be recorded. In *Herbert v. Herbert, supra*, it was expressly held, under the circumstances of that case, that “the act of recording a deed cannot amount to a delivery, when there does not appear an assent or knowledge by the grantee, of the act.”

There not only does not appear any assent, or knowledge on the part of Henry W. Kingsbury, of the act of recording the deed, but the want of both as clearly appears as any fact in the case. On the 17th of May, therefore, when the deed was recorded, it was not so far legally executed as to become operative. The delivery of a deed is usually shown by proving the fact of the grantee having it in his possession, or by other circumstances tending to the same conclusion. *Jackson v. Perkins*, 2 Wend. 308. In *Chapel v. Bull*, 17 Mass. 212, the court says: “A deed delivered at the register’s office, in the absence of the grantee, has been held with us to be a good delivery to the grantee, if he afterward assent and take the deed.” *Harrison v. Trustees, etc.*, 12 Mass. 456.

“The delivery of a deed, duly executed and acknowledged, to the register, aided by a subsequent possession of the deed by the grantee, might be evidence of a delivery to him.” 2 Hill. on Real Prop. 284, citing *Beers v. Broome*, 4 Conn. 247; *Dawson v. Dawson*, Rice, 243.

But here, the delivery of it at the recorder’s office is not aided by a subsequent possession of it by the grantee. There is not only no evidence that he ever had possession of it, or of circumstances tending to that conclusion, but it appears affirmatively that he never had. The only evidence from which assent to and acceptance of the deed by the grantee can be inferred consists of the conversation between him and Buckner in July, 1861, in Washington, and the grantee’s letter to his mother of the 23d October, 1861, referring to a previous conversation between them in August or September, same year.

Buckner relates the conversation thus: They (himself and grantee) were walking on the street near the president’s house, talking of the troubles in the country, when Buckner remarked: “By the way, the property of your sister has been deeded to you, and I want you to look after her interests, and see that she has her property.” To which Kingsbury replied: “That was all right,” or “very well,” or words to that effect. This was the only conversation they

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ever had on the subject, and the first time Kingsbury ever heard of the deed.

Subsequently, and in August or September, 1861, the grantee visited his mother in Old Lynn, Connecticut, and she testifies that she asked him in regard to his sister's property, whether it had been turned over to him, and told him that Simon (Buckner) had told her so. He (grantee) replied: "That is so, but don't look concerned; it is only turned over to me for safe-keeping; it will be restored to her."

This shows that Henry W. Kingsbury understood Buckner as meaning, in the remark made in July, that his wife's property had been deeded to the former in trust for her use. Then, without any communication, either by letter or otherwise, between him and his mother, intervening the conversation just referred to and the date of the letter of the 23d October, 1861, the grantee in that letter, written and signed by him, says to his mother: "I spent all the morning with Burnside yesterday. He states, as I told you, that Simon had made over the Chicago property that was held in his name to me; a new power of attorney is therefore necessary for you and myself. We made one out; I signed it; Burnside will send it to you; I send you a copy for your own keeping, and keep one for myself."

The power of attorney so referred to is as much a part of the letter, for all legal purposes, as if it had been copied at length into it, and tends to explain what property was intended by the statement that Simon had made over to him the Chicago property that was held in his name. The power of attorney is to Ambrose E. Burnside, appointing him attorney "to transact and conduct the business of the Kingsbury estate at Chicago," etc. The deed of the 15th May, 1861, was the only conveyance to Henry W. Kingsbury, to which Simon B. Buckner was a party, and was the only one to him from any source, and from the extrinsic facts and circumstances in evidence, especially the fact that there had been, at the time of writing the letter, no occasion upon which he had told his mother any thing about the property having been made or turned over to him, except that above referred to, upon his recent visit to his mother at Old Lynn, we must hold that the letter points unerringly at that conversation, the effect of which, in another aspect, will be considered hereafter. We are now attempting a solution of the question of the delivery of the deed. The evidence bearing most directly

upon that point is the brief but direct conversation between the grantee and Buckner in July, at Washington. The other subsequent acts and declarations of Kingsbury are viewed, in this connection, simply as showing his understanding of the position he had assumed in regard to his sister's property.

There can be no doubt, that up to the time of Buckner and the grantee meeting in July, the deed had not become operative. Although the grantors had parted with the personal possession of it, by leaving it with the recorder, still they could, at any time, have reclaimed and canceled it, with no other effect than that, perhaps, of casting a cloud upon their title, by its being recorded. The question to which we are directly brought is, therefore, whether, while the deed was so in the hands of the recorder, it was competent for the parties to effectuate a delivery and make the deed operative, by mere words alone, without any manual or personal possession of the deed by the grantee, or a previously authorized agent? By the old rule, delivery was said to be "either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be both; but by one of them it must be made, for otherwise, though it be never so well sealed and written, yet is the deed of no force." *Herbert v. Herbert, supra*; *Bryan v. Walsh*, 2 Gilm. 557; *Bennett et al. v. Waller et al.*, 23 Ill. 97. If a grantor, with or without any previous arrangement with the grantee, sign, seal and acknowledge a deed, place it in the hands of the register to be recorded, notify the grantee of the act, and he assent to receive it, by words only, this would be a good delivery, though the grantee die before taking it into his actual possession, because the assent is the principal element, and taking the deed into possession is not indispensable, but only evidence of assent and acceptance.

We think, therefore, that when Buckner notified Kingsbury, in July, of the making of the deed, the latter by his reply assented to receive it, and that this view is confirmed by his subsequent acts and declarations. The deed, then, for the first time became operative. But by the very words which made it operative was created a trust by contract, which, if manifested and proved by some writing signed by the grantee, as required by the statute of frauds, is valid. This conclusion disposes of the question of resulting trust in this case so strenuously insisted upon in argument. When there is an express trust, there can be no foundation for an

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implied or resulting trust. Whether the declaration of such trust was manifested and proved by some writing signed by the grantee, within the meaning of that statute, is the question which now demands our consideration. This statute was passed in 1827. It was, in this respect, borrowed from and is but a copy of the English statute of 29 Car. 2, which had been in force in the mother country since 1677, and received a construction, by the courts of that country, long anterior to its adoption here; from which we must presume that it was adopted with the construction so given it, or else the language would have been changed.

The fourth section of the English statute, as to certain contracts, required the agreement itself to be in writing, signed (*Wain v. Warlters*, 5 East, 10), whereas the seventh section, respecting trusts, is worded very differently, and requires only that all declarations or creations of trusts should be *manifested and proved* by some writing signed by the party. Upon the strength of this peculiarity in the wording of the clause, it was held that letters and other written documents, though long posterior in date to the transaction itself, would have an operation equivalent to that of a formal and coeval declaration of trust. In *Forster v. Hale*, decided by the master of the rolls in 1798 (3 Ves. Jun. 696), and by Lord Chancellor LOUGHBOROUGH in 1800 (5 Ves. 308), the chancellor entirely agreed with the master of the rolls in adopting the letter as a clear declaration of trust, by which he said he meant clear evidence, in writing, that there was such a trust. It is not necessary, continued his lordship, that it should be a declaration, but a writing, signed by the party, may be evidence of a trust admitted in that writing. Nor was it necessary to produce an instrument expressly framed for the purpose of acknowledging the trust, it is fully sufficient if the recognition or admission of it is incidentally made in the course of a correspondence. But when letters are to manifest a trust, there must be a clear demonstration that they relate to the subject; and it appears from *Forster v. Hale*, as well as from the cases of *Tawney v. Crowther*, 3 Bro. Ch. 161, 318, and *O'Hara v. O'Neill*, 7 Bro. C. P. 227, that if the letters afford evidence of the existence of a trust, the terms may be supplied *aliunde*. Roberts on Frauds, 101, 102.

“The principal point to be noticed is, that trusts are not necessarily to be declared in writing, but only to be *manifested and proved* by writing; for, if there be written evidence of the existence

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of such a trust, the danger of parol declarations, against which the statute was directed, is effectually removed." Lewin on Trusts, 63, citing *Forster v. Hale*, *supra*.

"When there is any written evidence showing that the person apparently entitled is not really so, parol evidence may be admitted to show the trust under which he actually holds the estate." Browne on Frauds, 110, § 111, citing *Cripps v. Jee*, 4 Bro. Ch. 472; *Hutchins v. Lee*, 1 Atk. 447. To the same effect, 2 Sugd. on Vend. (7th Am. ed.) 911; Hill on Trustees, 62.

A great number of cases were cited at bar, varying in facts and circumstances, though tending, perhaps, to establish the same rules of construction, or define the kind and degree of evidence which will satisfy the requirements of the statute. To cite and review them all would be a needless task, as the general conclusions arrived at are well stated in the elementary works referred to, and others of equal authority. Every case, after all, must depend upon its own circumstances, and we must decide this case, not upon some particular feature of resemblance to this or that reported case, but upon the strength of its own undisputed facts, the circumstances by which the transactions were surrounded, and the application of those general principles by which courts of equity are governed in the exercise of a jurisdiction which reaches to the essence of things, regardless of forms, which probes the conscience and compels it to respond to the duties of every trust legally established, as from its own promptings it would be inclined to do, if left undisturbed by those passions to which human nature, unhappily, is but too prone.

We have seen that the trust is not necessarily to be declared in writing, but only to be manifested and proved by writing, and if there be written evidence of the existence of the trust, the danger of parol declarations, against which the statute was directed, is effectually removed. Lewin on Trusts, *ubi supra*.

Is there in this case written evidence of the existence of a trust? There are but two items of that tendency: the letter and the will. The circumstance that the letter was written by the grantee to his mother, and not to the person claiming to be *cestui que trust*, is not material. The letter is somewhat ambiguous in language, but it is clear that it relates to the subject. The grantee says: "I spent all the morning with Burnside yesterday. He states, as I told you, that Simon had made over the Chicago property that was held in his name, to me." The words "had made over" might mean as a

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donation, as a mortgage, or as passing a nominal title for the use of the grantor.

It appears, as an extrinsic fact, that at the date of the deed, Buckner held the nominal legal title for the use of the heirs, to some seventy-five feet fronting upon the Chicago river, which had been thus conveyed to him by his father-in-law; and it was claimed in argument that the letter simply referred to that parcel. It is conceded that the language of the letter standing alone would limit the reference to that parcel. The person referred to as "Simon" undoubtedly means Simon B. Buckner. The words "had made over" had reference to some conveyance. The writer must, therefore, have intended, by these words, the making of a deed, covering Chicago real estate, to which Buckner was a party as grantor, and himself as grantee. As there never was any such deed but that made by Buckner and wife to him, of the date of May 15, 1861, we must presume that that deed was the one intended by the words "had made over." The deed did in fact convey the parcel to which Buckner held the nominal title, but also all of Mrs. Buckner's interest in the property therein described, which was all of her father's estate in Chicago. The evident purpose of this peculiar allusion to the matter in the letter, with the reference to something which the writer had previously told her, was to admit the trust to her, but in such terms as that others might not understand it. At that time Buckner was in the military service of the so-called Confederate States, and his wife within their military lines.

But there is another feature to the letter that must not be overlooked. After mentioning the fact that Burnside had stated to him, as he had told his mother, that Simon had made over the Chicago property, etc., he says: "A new power of attorney is therefore necessary for you and myself. We made one out. Burnside will send it to you. I send you a copy for your own keeping, and keep one myself." This power of attorney was so referred to in the letter, as to incorporate it as a part of the letter. Upon examination, it appears to relate to the entire Kingsbury estate in Chicago. By it Burnside is appointed attorney to transact all of the business of the estate, but restrained from disposing of any part of it, except to negotiate loans, under certain restrictions, and from making leases to extend beyond the term of three years. Now, if we are to assume that the letter had no reference to any of the estate, but the parcel of land held in Buckner's name, then, from the fact that the

power of attorney gave Burnside control of the entire property, we must impute to him, an old and confidential friend of the family, and a man of high position and character, and to Henry W. Kingsbury, the only brother of Mrs. Buckner, upon the most affectionate and confidential terms with her and her husband, the wrongful and unnatural purpose of usurping control over Mrs. Buckner's share in her father's estate. This we will not do, because it is a more reasonable construction of these acts, and one far more just toward the parties, to hold that reference was had to the deed of May 15. That deed purports to be a bargain and sale, but upon the nominal consideration of one dollar. Upon the question of establishing a trust against the title of a volunteer, which is not favored in equity, the statement of a mere nominal pecuniary consideration will not be allowed to affect the construction or operation of the deed. Hill on Trustees, § 107, top paging 148; *Young v. Peachy*, 2 Atk. 256.

It appears from the evidence, and is uncontradicted, that the grantee neither paid nor became responsible to pay, by any promise, express or implied, any valuable consideration whatever for the property conveyed. Upon the question under consideration, the fact of the deed being made *ex parte*, as appears was the case here, without communication with the donee, is a circumstance to which much attention will be paid. Hill on Trustees, 108; *Cecil v. Butcher*, 2 Jac. & Walk. 574.

These facts and circumstances form legitimate ingredients of evidence, in reference to which, and the relative situation of the parties, the letter should be construed. If the grantee had purchased the property and felt the independence of a purchaser, would he not have placed himself in that character? Would he have used the unusual expression for such a relation, as that the grantor "had made over to him" the property? On the other hand, did he regard the conveyance as a donation to him? Is it reasonable to suppose, under all the relations existing, that if he had received, or supposed he had, a gift from his sister and her husband, of real estate of the known value of half a million dollars, he would immediately, upon being satisfied of the fact, thus address his mother concerning so munificent a gift, without the slightest manifestation of either surprise or gratitude? Such a thing is against all our knowledge of human nature and experience in the affairs of mankind. Why should Mrs. Buckner desire or intend to give away this vast fortune to her brother, who had sufficient already,

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and to whom she was under no particular obligations, and retain for herself and her own children only a pittance arising from the Waterbury property, of the value of less than four thousand dollars? No explanation has been attempted, and none, we apprehend, can be given. The circumstances all conspire to show, with irresistible force, that it was the intention of the parties at the time that Henry W. Kingsbury should take as trustee for one of the grantors, and not for his own benefit. And the language of the letter is a fair admission to that effect. It imports that the writer was not the real owner of the property. Then, as strengthening this position, we refer to the only other item of written evidence: the will, and so far as pertains to the present inquiry, it is immaterial whether that instrument was valid and operative as a will or not.

On the 25th of March, 1862, while Henry W. Kingsbury was at Fortress Monroe, in the State of Virginia, temporarily, in a military capacity, he wrote and signed with his own hand a will, by the first clause whereof, he declared that: "To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of *my* Chicago property as, upon a fair appraisal, may be valued at that amount." By the second clause: "To my sister, Mary J. Buckner, I leave so much of *the* Chicago property *held in my name* as shall amount to one-third of the property in the city of Chicago left by my father, Julius J. B. Kingsbury, deceased." By the third clause: "To my cousin, John J. D. Kingsbury, I leave *my* property in Waterbury, Connecticut," etc. By the last clause he declared that: "The remainder of *my* property, of every description, I leave to my devoted wife Eva," etc.

There is little doubt but the making the portion devised to his sister one-third, instead of one-half, subject to his mother's right of dower, was the result of a misapprehension, arising from his youth and inexperience, and the manner in which the income had been previously divided. But it will be perceived that in the clause relating to the devise to his sister he uses the peculiar expression: "So much of *the* Chicago property *held in my name*." Whereas, in the devise to his mother it is: "So much of *my* Chicago property," etc. To his cousin it is: "*My* property in Waterbury," etc. To his wife: "The remainder of *my* property," etc. It is an undisputed fact that the only Chicago property held in his name was that conveyed by the deed of May 15th. Why this peculiarity of language, if he had not thereby reference to his sister's share thus

conveyed? And why say "*the* Chicago property held in my name," in that connection, unless in deference to the truth? The expression excludes every idea but that of a nominal title, and is equivalent to saying, "held by me in trust." The deed of May 15th purports, as we have before said, to be a bargain and sale. Is it not clear, then, from the letter and will, when viewed in the light of surrounding circumstances, that the agreement really made between the parties was not that stated by the deed? We think it is, and that, therefore, there is written evidence of the existence of a trust, and the danger of parol declarations, against which the statute was directed, is effectually removed. "If there is some written evidence inconsistent with the fact that the supposed purchaser was the actual purchaser, further evidence by parol is admissible to prove the truth of the transaction." 2 Sugd. on Vend. (7th Am. ed.) 911.

"When there is any written evidence that the person apparently entitled is not really so, that will open the door to the admission of parol evidence to prove the trust, notwithstanding the statute." Hill on Trustees, 62.

The letter of the grantee makes reference to a particular parol declaration. As there appears to have been but one occasion upon which he had before then made any declaration to his mother on the subject, *that* will be regarded as the one intended. *Shotrede v. Cheek*, 1 Adol. & Ellis, 57. The declaration was made but a short time after the conversation between him and Buckner, as to the fact and purposes of the deed. The latter had visited his mother-in-law in Connecticut, and had probably told her about it. Then when Henry visited her in August or September, it was natural that she should make inquiries concerning it. She did. She inquired of him whether his sister's property had been turned over to him, telling him that Simon had told her so. He replied, "That is so, but don't look concerned; it is only turned over to me for safe-keeping; it will be restored to her."

If there were no written evidence of the existence of a trust, and the letter were clear and unambiguous in its terms, we are inclined to think that, under the doctrine of reference to words, parol evidence would not be competent for the purpose of manifesting and proving a trust as required by the statute of frauds.

In Virginia, it has been decided that a letter containing a promise to make a deed of a tract of land "according to contract" is a sufficient memorandum under the statute of frauds, notwithstanding

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the terms of the contract are not mentioned, provided the party claiming the conveyance can prove by the testimony of one witness the price which was agreed to be paid for the land. *Johnson v. Ronalds, adm'r*, 4 Munf. 77.

The doctrine of this case seems to be contrary to the general rule of the English courts, they having required, unless under certain exceptional circumstances, that the reference be to some document in writing, though it has not been deemed indispensable that such writing be signed. *Clinan v. Cooke*, 1 Sch. & Lef. 32; *Hodges v. Horsfall*, 1 Russ. & Myl. 116; *Saunderson v. Jackson*, 2 Bos. & Pull. 238, and the same rule as to a contract for the sale of land was followed by Chancellor KENT in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274.

Still, it has been held that when a reference has been made to words by a will, the words may be proved by parol, not for the purpose of varying the terms of the will or adding to its contents, but for the purpose of describing or defining what was meant. *Sanford v. Raikes*, 1 Meriv. 646.

“And, in some cases of *trusts imperfectly expressed*, parol evidence has been held admissible in explanation of the intent. Thus, when a testator devised his estate to his wife, ‘having a perfect confidence that she will act up to *those views which I have communicated to her* in the ultimate disposal of my property after her decease,’ the wife afterward died intestate, and a bill was filed by his two natural children for relief against his heir and next of kin, and her heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his estate, after her death, to the plaintiffs, and that she promised to do so, parol evidence was admitted in proof of this allegation.” 3 Greenl. Ev., § 365, p. 370, referring to *Podmore v. Gunning*, 5 Sim. 485; S. C., 7 Sim. 644.

It is not necessary to this case, and we do not commit ourselves to the doctrine of *Podmore v. Gunning* to the full extent to which the learned author upon evidence has accepted it, because the admission of parol evidence in that case may be consistently placed upon another ground, viz.: That if a person obtain property under a will, upon a parol assurance that he will dispose of it in a particular way, the court will regard his attempt to keep the property, or dispose of it otherwise, as a fraud, and not allow him to set up the statute of frauds where a compliance with the statute would be to give effect to the fraud which it was intended to prevent.

From the best investigation we have been able to give to the question, and the authorities which bear upon it, we have arrived at the conclusion, that, inasmuch as the written evidence clearly establishes the existence of a trust, parol evidence of the words referred to in the letter is admissible for the purpose of describing or defining what was meant by the letter, and as showing the truth of the transaction.

To search for artificial rules by which to exclude such evidence, beyond the just demands of the statute of frauds, would be an attempted reversal of some of the most favorite maxims of courts of equity; would be the exercise of astuteness in the ways of defeating the plain intention of the parties, and aiding in the consummation of a fraud; for when a trust is once established by legal evidence, equity regards every attempt by the trustee to appropriate the trust property to himself, to the exclusion of the rights of the *cestui que trust*, as a fraud contemplated upon the latter.

The late Henry W. Kingsbury was, as this case shows, not only a trustee of the property, for his sister, but he was an honest trustee. By the last act of his life, in this respect, he designed to, and did, admit the existence of the trust, and endeavored to execute it. Immediately after his death, his widow, one of the defendants, in a letter to the mother of her deceased husband, recognized and admitted the trust, so far as she was concerned, in the most express terms, and seemed distressed at the suggestion of any obstacle to its immediate execution. Though her relations in life, and to the *cestui que trust*, became afterward changed by another marriage, yet it is incredible that if she has been cognizant of the efforts which have been made to conceal the most important item of evidence of her former husband's relation to this vast property, and to wrest it from its proper channel, she can view them otherwise than with feelings of sorrow and regret. Her conduct has been the subject of severe criticism by counsel, but we are inclined to believe that she, like the unconscious infant whose name appears as plaintiff in the original bill, is but the involuntary instrument in the hands of designing men, who stand in no such relation to the memory of the deceased trustee as does Eva Lawrence.

The trust being sufficiently manifested and proved by writings, signed by the party who was, by law, enabled to declare it, it must be executed.

This conclusion renders unnecessary any discussion of the ques-

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tion, made by appellants in the cross-bill, as to the sufficiency of the acknowledgment of the deed by Mary J. Buckner, or of the question made by appellant in the original bill, as to the execution and probate of the will; because, if properly executed and admitted to probate, the will would be governed by the laws of this State, where the property is situated; and the posthumous birth of the infant Henry W. Kingsbury would, by those laws, operate as an abatement of all devises of property so situated. Gross' Stat. 800, § 16, "Wills." Besides, the testator was incapable of divesting the property held in his name, for the use of Mary J. Buckner, by any devise he could make.

The decree of the court below, dismissing both bills without prejudice, must therefore be reversed and the causes remanded, with directions to that court to dismiss the original bill absolutely, and to grant the relief prayed in the cross-bill, by a decree establishing the equitable title in Mary J. Buckner, to her proper share of the real estate described in the deed of May 15, 1861, declaring the trust, and requiring the proper conveyance of the legal title to her, divested of any life estate in her husband (he having renounced the same), and of all right of dower in Eva Lawrence; that an account be taken between said Mary J. Buckner and all other parties interested in the estate of Julius J. B. Kingsbury, deceased, according to the rules and practice of the court of chancery in such cases, and it be decreed accordingly.

Decree reversed.

GRAFF, appellant, v. FITCH.

(58 Ill. 373.)

Sale — when property passes.

T. sold to plaintiff part of a growing crop of corn, designating the part sold by cutting off the tops of one row. Plaintiff paid \$80 in cash, but, by the terms of the sale, T. was to cut and shock a part of the corn, and to gather the remainder, and the corn was then to be measured and paid for by the bushel. Subsequently, the said corn was levied on by virtue of an execution against T. In a proceeding to try the right of property, there was evidence tending to show that it was the intention of the parties that the sale should be complete and absolute at the time it was made. *Held*, that an instruction to the

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jury that, if the vendee was to cut and measure the corn, and it was then to be paid for by the bushel, no title passed to the vendee, and the property was liable to the executor, was error. Whether title passed or not was a question of intention, and was for the jury. (*See note, p. 90.*)

PROCEEDING by Graff before the sheriff of Morgan county, to determine the right of property to part of a certain field of corn. Graff claimed to have purchased the corn while growing from one Thompson, the owner. The sheriff subsequently levied on it, under an execution in favor of Fitch against Thompson. The defendant had judgment in the court below, and the claimant appealed.

Ketcham & DeLuw and Brown & Epler, for appellant.

J. T. Springer and Morrison & Whitlock, for appellee.

SHELDON, J. This was a case of the trial of the right of property to a certain piece of a field of corn, which Sierrer, as sheriff, had levied an execution upon, and which Graff claimed as owner.

The trial in the court below resulted in a verdict and judgment for the defendant.

The only question presented upon the record is upon the action of the court on instructions, and in excluding evidence of certain proceedings under a distress warrant for rent, which took place subsequently to the commencement of this suit.

The giving of the following instruction for the defendant is assigned as error, viz. :

"The court instructs the jury for the defendant, that if they find from the testimony in the case that the property in question was grown or produced by Peter D. Thompson, the defendant in the execution, and that on or about the 6th day of September, 1869, the claimant, Washington Graff, purchased the said corn of Thompson, while the same was standing in the field and not mature, and that, by the terms of said purchase, the said Thompson was to cut and shock a part of said corn, and to gather the remainder, and that the quantity was then so to be ascertained, and the same be paid for at 40 cents per bushel, then by said sale no title passed to said Graff, and said property was liable to the execution in the hands of the defendant, and if from the evidence it appears to the jury that the levy was made before said corn was measured and the number of bushels ascertained, the verdict must be for the defendant."

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The bill of exceptions recites the following admitted facts and evidence:

“That a judgment had been obtained by Darius R. Fitch against one Peter D. Thompson; that on said judgment an execution had issued, by virtue of which the sheriff of said county had levied on the corn in dispute, and that the plaintiff or claimant had given the said sheriff regular formal notice to try the rights of property.”

“The claimant, Washington Graff, was thereupon introduced as a witness to the jury, and testified that on the 6th day of September, 1869, he purchased of said Peter D. Thompson all the corn raised by the said Thompson on the west half of the south-west quarter of section 16, township 16, range 8, in Morgan county, Illinois; that it was the same corn levied on by virtue of the execution in favor of Darius R. Fitch and that the purchase was made prior to the levying of said execution; that he (Graff) paid Thompson \$80 cash for the corn at the time of its purchase standing in the field, not fully ripe nor fit for harvesting; that it was in a field where was other corn; that he purchased all of Thompson’s corn except four or five acres, and, in order to ascertain the corn so purchased, he (Graff) and Thompson went into the field and cut off the tops of one row of corn for a considerable distance in from the fence, so that there would be no mistake about the corn which Graff was to have, and so that the part which he (Graff) was to have might be plainly designated and set apart, and he (Graff) was to have all of the piece of corn so designated at the rate of 40 cents per bushel, whether there was 100 or 200 bushels.

“Then, afterward, when the corn was in fit condition, it was to be partly put in shocks and partly snapped by said Thompson, and then measured and paid for by the bushel; that the purpose of witness in purchasing was in part to secure the rent due him from said Thompson; that he understood the corn to have been delivered to him, and to be at his risk from the date of said sale.”

This was all the evidence offered by either of the parties.

In many cases of sales of personal property, it is a nice and difficult question whether or not the title has passed.

The property does not pass absolutely, unless the sale be completed; and it is not completed, so long as any thing remains to be done to put it into a condition for sale, or to identify it, or discriminate it from other property with which it is connected. The corn in this case was in a condition to be sold. Growing crops are a

proper subject of sale as personal property by parol, and their sale is valid as against creditors. *Bull v. Griswold*, 19 Ill. 631; *Bellows v. Wells*, 36 Vt. 600.

There was nothing to be done here to identify the property, or to designate it from any common mass with which it was mingled. The subject of the sale was specific, and not indeterminate. It was a part of a field of corn, which was marked off and separated from the rest of the field by a visibly marked boundary. And the measuring of the corn, which was to be had afterward, was merely to ascertain the amount of the whole price, at the rate per bushel agreed upon between the parties.

The general doctrine to be found in the books is, doubtless, as stated in 1 Parsons on Contracts, 527, that the sale of personal property is not completed, while any thing remains to be done to determine its quantity, if the price depends on this, unless this is to be done by the buyer alone.

But there is a class of cases which hold that, if the parties intended that the sale should be complete before the goods sold were weighed or measured, the property will pass before this is done.

Was there any evidence here showing the intention of the parties that the sale should be complete and absolute at the time of making the contract?

Where the goods are actually delivered, that shows the intent of the parties to complete the sale by the delivery. Here was a performance of acts of delivery, in marking off and separating the part sold, entitled, perhaps, to consideration, as indicative of an intent to transfer the property absolutely.

Where the payment of the price, or giving security therefor, is not a condition precedent to the transfer, it may well be the understanding of the parties, that the interest shall pass at once to the vendee, although the measure of the articles sold remains yet to be ascertained.

Here the purpose of the purchase was in part to secure the rent due from Thompson — and perhaps it is not a very strained inference that the \$80 paid in cash was about the probable estimate of the value of the corn over and above the amount of rent due; so that in effect the price might be regarded as paid down.

If the purpose was to obtain security for a debt, it would have been illy accomplished, by leaving the sale in such an incomplete

state, that the property could be taken by creditors of Thompson, and subjected to sale under their executions.

If it was the intention of these parties to appropriate this piece of corn to the payment of the rent due from Thompson to Graff, by an absolute transfer of it, we see no sufficient reason why their intention should be frustrated by the fact that Thompson was afterward to perform some work in harvesting the corn, and it was to be measured to ascertain the amount of the price to be allowed for it at the rate agreed upon.

Such a sale, with the understanding that Graff himself was to perform those same acts, would doubtless be a valid and complete sale, or that he should employ a third person to do so, and why should an arrangement that Thompson should do it vary the result?

The case presents a question of the intention of the parties to the contract.

While the general doctrine on this subject may be regarded to be, that where some act remains to be done in relation to the articles which are the subject of the sale, as that of weighing or measuring, and there is no evidence tending to show an intention of the parties to make an absolute and complete sale, the property does not pass to the vendee until such act is performed, yet where it appears that the parties intended that the sale should be complete before the articles sold are weighed or measured, the property will pass before this is done.

These views are sustained more or less fully by the following authorities: *Bell v. Farrar*, 41 Ill. 400; *Macomber v. Parker*, 13 Pick. 175; *Riddle v. Varnum*, 20 id. 280; *Crofoot v. Bennett*, 2 Comst. 258.

We think, then, that this instruction was erroneous, in pronouncing, as a matter of law, that, under the facts stated, no title passed, without any reference to the intention of the parties whether the sale should be complete at the time of the contract.

There was evidence tending to show the intention of the parties that the sale of the corn should be complete before it was measured, and the instruction should have been qualified so as to make it dependent upon such intention, whether the title passed by the sale or not.

The claimant's instructions being the converse of the defendant's, were properly refused for the same reason, in leaving out of view the intention of the parties. The distress warrant proceedings were

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rightly excluded — an acquisition of title to the property, subsequently to the commencement of the proceeding for the trial of the right of property, could not be shown.

The only view in which they might be relevant would be to show a prior landlord's lien upon the property, but they would not be competent evidence for that purpose.

The judgment must be reversed and the cause remanded.

Judgment reversed.

NOTE. — That a contract for the sale of specific goods, or of goods identified with, if such appears to be the intent of both parties, pass to the purchaser the title to the property, without delivery, although some thing remain to be done by the seller to put the property in condition for final delivery, was held in *Marble v. Moore*, 102 Mass. 442; *Bemis v. Morrill*, 38 Vt. 153; *Beecher v. Mayall*, 19 Gray, 376; *Young v. Mattheus*, L. R., 3 Q. P. 127; *Martineau v. Kitching*, L. R., 7 Q. B. 449; *Falk v. Fletcher*, 18 Q. B. N. S. 408; 11 Jur. N. S. 176; *Merchants' National Bank v. Bangs*, 102 Mass. 295.

So, although something remains to be done for the purpose of testing the property, or to fix the amount to be paid, by weighing, measuring or the like, the property will pass before the act was done, if such appears by the contract to have been the intention of the parties. *Turley v. Bates*, 2 H. & C. 200; *Alexander v. Gardner*, 1 Bing. (N. C.) 671; *Castle v. Playford*, L. R., 7 Exch. 98; *Fitch v. Burk*, 33 Vt. 683; *Jenner v. Smith*, L. R., 4 Q. P. 370; *Riddle v. Varnum*, 20 Pick. 233; *Drury v. Williams*, 5 Allen, 8, per CHAPMAN, J.; *Cushman v. Holyoke*, 34 Me. 289; *Williams v. Adams*, 3 Sneed, 359; *Ford v. Chambers*, 23 Cal. 13; *Cummins v. Griggs*, 3 Duvall, 87; *Burr v. Williams*, 23 Ark. 244; *Terry v. Wheeler*, 25 N. Y. 525; *Russell v. Carrington*, 42 N. Y. 118; *Fulkins v. Whyland*, 24 id. 241.

It depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to the buyer at the time of the sale, or on the completion of the goods. *Young v. Mattheus*, L. R., 3 Q. P. 127; *Fuller v. Bean*, 34 N. H. 300; *Stone v. Peacock*, 25 Me. 333; *Bellows v. Wells*, 35 Vt. 509; *Morse v. Sherman*, 102 Mass. 430.

The question of intent is for the jury. *McClung v. Kelly*, 31 Iowa, 508; *De Kidder v. Knight*, 13 Johns. 294; *Riddle v. Varnum*, 20 Pick. 233; *George v. Stubbs*, 25 Me. 250. — RMR.

EIDMAN, appellant, v. BOWMAN.

(53 Ill. 444.)

Corporation — power of directors to increase capital stock.

The charter of a corporation provided that its capital stock should be \$100,000, with the power to increase it to \$500,000, but did not provide by whom this power should be exercised. *Held*, that the board of directors could not increase the capital stock without the assent of the stockholders. (See note p. 95.)

APPEAL from an order dissolving an injunction and dismissing the bill.

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G. Koerner, Wm. S. Kase and Mortimer Millard, for appellants.

Wm. H. Underwood, for appellees.

WALKER, J. This was a suit in equity, brought by appellants in the St. Clair circuit court against appellees, to enjoin and restrain them from issuing further certificates of subscription to the capital stock of the East St. Louis Bank.

It appears that the corporation was created by an act of the general assembly at the session of 1865, and its charter provides that the capital stock of the bank shall be \$100,000, with the power to increase it to \$500,000, to be subscribed and paid for in the manner prescribed by the by-laws to be formed by the company, and to be divided into shares of \$100 each, and shall be transferable on the books of the company in the manner prescribed by its by-laws. Books were opened for subscriptions, and \$100,000 were subscribed to the stock. The company was organized, and a board of directors elected by the subscribers, and 30 per cent of the stock has been paid in on the subscription.

It further appears, that on the 15th day of May, 1869, the board of directors gave notice that an election for directors would be held on the second day of the next June, at the bank; and on the 19th of May they appointed their judges of election. On the 26th of May, the directors held a meeting, and changed the by-laws so as to authorize the directors to issue shares and increase the stock of the company two hundred shares, each share being for \$100. Of this meeting and of its proceedings the shareholders had no notice until after the by-laws had thus been altered, and a portion of the directors objected to the change then made. The amount of shares thus authorized to be issued was then subscribed, as complainants allege, for the purpose of increasing the number of votes of the subscribers at the approaching election, and to give its control to them, but this is denied by appellees. The bill prayed an injunction to restrain the directors from issuing or disposing of the certificates, and to restrain the judges of election from receiving any votes represented by the two hundred shares thus issued. On the trial below, the court dissolved the injunction and dismissed the bill, and the case is brought here by appeal.

In this case, we shall only consider the questions presented and discussed, which are, whether the directors had the power, under

their charter, to order the increase of the stock and open books for its subscription without the assent of the shareholders. It will be observed the charter, in terms, confers the power to make the increase, but is silent as to the mode in which it shall be done. It would seem to admit of no doubt, that it is to be done by the directors alone, by a vote of the stockholders conferring the power on the directors, or by their joint action. That the directors are but the agents or trustees of the shareholders, for the honest, faithful and prudent management of the legitimate affairs of the shareholders, there is no doubt. But the question is as to the extent of their powers. Are they unlimited? Are all of the powers conferred on the company delegated to them by their election and admission to their office, or are there powers which are still reserved to the shareholders, and which cannot be exercised by them until the power is conferred by the shareholders? It would seem that the management and transaction of all business for which the company was created, and the general affairs of the corporation, devolve upon and may clearly be exercised by them; and there are other powers that are as clearly reserved to the shareholders.

The power to appoint or elect directors does not devolve upon them, but that power is reserved to the shareholders. The power to sell and transfer the charter and franchises is not granted to them; the power to dissolve the body is not within the scope of their authority; and other powers which they are unable to exercise might be enumerated. Is the power possessed by them to effect great or radical changes in the organization of the body without the consent of the shareholders? Can they, at pleasure, and without the consent of the shareholders, increase or diminish the capital stock of the company, and thus materially affect the value of the shares and the amount of dividends?

When this incorporation was organized, the charter, and all of its franchises and privileges, vested in the shareholders, and the directors became their trustees for its management. The right to the remainder of the stock, when it should be issued, vested in the original stockholders, in proportion to the amount each held of the original stock, if they would pay for it, and was as fully theirs as was the stock already held, and for which they had paid. *Gray v. Portland Bank*, 3 Mass. 365. It is true that the shareholders hold no certificates evidencing their title, and it is, perhaps, not transferable, even under a by-law authorizing its sale, but is, neverthe-

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less, a right vested in the original shareholders which, although intangible, the law recognizes and protects.

When the company determine to increase their capital stock within the limits of their charter, each of the previous shareholders has the right to a proportionate number of the new shares, or a proportionate amount of the new stock, if it should be added to the old shares. He may waive this right, but if he does not, and is deprived of it, he may sue the company by a special count in assumpsit, and recover for the loss. And it has been held, that the measure of damages is the excess of the market value of the stock above the par value, at the time of payment of the last installment, with interest on the excess. *Gray v. The Portland Bank, supra*; Angell & Ames on Corp. 430. These authorities establish the proposition, that the reserved and unsold stock belongs to the shareholders of the company as their individual property, precisely like the shares for which they have paid and hold certificates, except it is not paid for, and it may, without their consent, be sold to *bona fide* purchasers without notice, so as to deprive them of the right; but still the right is complete.

In the case of *Gray v. The Portland Bank, supra*, it is said, that a corporation may be considered the trustee for the management of the property, and each stockholder a *cestui que trust*, according to his interest and shares; then, a limitation of the capital to be employed in the trust, that it shall not be less than one sum and not greater than another, is not a power granted to the trustee to create another interest for the benefit of other persons than those concerned in the original trust, or for their benefit, in any other proportions than those determined by their subsisting shares. "A share in the stock or trust, where only the least sum has been paid in, is a share in the power of increasing it, when the trustee determines, or rather when the *cestuis que trust* agree upon employing a greater sum, within the limits provided in the purposes of the trust."

The court does not, in terms, say the shareholders alone have the power to agree upon an increase of the capital stock, but the intimation is strong in that direction. That was manifestly the strong inclination of the court; and that such should be the rule, we think is supported by reason. As we have seen, the right to a proportional share of the reserved stock is vested in each of the shareholders, and is his individual right, and he may sue and recover

for being deprived of its benefit; and it is manifest, that the directors have no more power over the individual property or rights of the shareholders than of other persons. It cannot be presumed that the general assembly intended to confer such a power upon the directors. They have as just a right to undertake to transfer their shares, for which they hold certificates, as to deprive them of their right to acquire the additional stock.

It would be a dangerous power to intrust to directors to increase the stock of the company at pleasure, and to sell it to whom they might choose. Such a power would be liable to great abuse; it would enable directors to perpetuate their official position almost indefinitely on a reserved capital stock of \$400,000; it would enable them, at pleasure, to depress the price of the stock in market; it would deprive the original shareholders of their just and legal right to dividends, if the new stock were issued to persons not already members of the corporation. Other injustice and wrong could be perpetrated, if this should be held to be an incidental power to be exercised by a board of directors of a corporation. The power is such, that we will not infer its existence in a charter, unless clearly expressed; and the charter in this case contains no such language. It then follows, that appellants were entitled to the relief sought, as the sale of the certificates of stock was without power on the part of the directors, the shareholders not having agreed to an increase of the stock. And, if it remained in the hands of appellees, it should have been, under the general prayer for relief, decreed to be canceled.

This view of the case renders it unnecessary to consider the question, whether there is power under the charter to increase the stock until the full amount of the first \$100,000 has been paid. For that reason, we decline to discuss that question at this time.

It is, however, urged, that even if the directors had no such power, the shareholders had ratified the act. The allegation is unaccompanied with any of the facts as to the time, manner or circumstances under which the ratification is claimed to have been made. Whether before or after the suit was commenced, does not appear, nor is it alleged whether the ratification was direct, or only by implication; whether it was at a meeting of the shareholders, or by each separately; whether by verbal or written assent. In fact, nothing is alleged by which the court can determine whether it was legal, or only void; it is only the conclusion of the pleader that is stated.

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If a ratification could be set up as a defense, it fails to appear the alleged one was made at a meeting of the stockholders, called on proper notice.

For the reasons indicated, the decree of the court below must be reversed and the cause remanded.

Decree reversed.

NOTE. — In the *Chicago City R. R. Co. v. Allerton*, not yet reported, the supreme court of the United States, at the October term, 1873, held that the power to increase the capital stock of a corporation is in the stockholders and not in the directors. — *RUR.*

CHASE, plaintiff in error, v. CHENEY.

(58 Ill. 509.)

Ecclesiastical law. Jurisdiction. Church discipline.

In a suit to enjoin the plaintiffs in error, as an ecclesiastical court, from proceeding with the trial of the defendant for alleged offenses and misconduct as a presbyter, *held*, (1) that the fact that the commission issued by the bishop, appointing persons to investigate the charge and make presentment, was irregularly issued, would not affect the jurisdiction of the ecclesiastical court; (2) the ecclesiastical court is the exclusive judge of the sufficiency of the presentment; (3) such court is not bound by the rules of law as to challenge of jurors; (4) where there is no right of property involved except clerical office or salary, the spiritual court is the exclusive judge of its own jurisdiction. LAWRENCE, C. J., and SHELDON, J., dissenting.

SUIT in chancery to enjoin the action of an ecclesiastical court. The necessary facts are stated in the opinion.

William C. Goudy and S. Corning Judd, for plaintiffs in error.

Melville W. Fuller, for defendant in error.

THORNTON, J. This is a bill to enjoin plaintiffs in error, as an ecclesiastical court, from proceeding with the trial of the defendant, for alleged offenses and misconduct as a presbyter of the diocese of Illinois and rector of Christ church, in the city of Chicago.

The injunction was originally granted without notice, and a motion was then made to dissolve it, which, upon the hearing on

bill, answer, replication and affidavits, was overruled. The case is before us by writ of error.

The bill alleges the issuing of a commission by the bishop of the diocese, appointing three persons as presenters, the finding of the presentment, and a citation giving notice of the time and place of trial; that the accused, in person and by counsel, appeared when the court was organized, and preferred objections to the validity of all the papers, which were overruled, and claimed his right of challenge of the persons who were selected to try the issue, which was denied; that the commission, presentment and citation are void, and give no authority to the assessors; that the accused receives from his parish \$4,500 per annum, and enjoys a rectory rent free, and has received numerous calls from other parishes, in other dioceses, at much higher salaries; that he has not been guilty of any offense for which he is liable to be tried, and yet the bishop is prejudiced against him, has prejudged his case, and is determined to convict and deprive him of his position and its emoluments; that the respondents were selected to condemn; they sympathize with the bishop, and, with him, belong to the high church party; and that complainant is attached to the low church party in the Protestant Episcopal church; and he and the bishop are diametrically opposed in their views.

There are numerous affidavits filed, which we shall not consider in the view we take of this case.

The charge of prejudice and combination is denied by the answers, and the only proof to sustain it, worthy of any consideration, is in the affidavit of the accused.

A stipulation was entered into and made a part of the record, that the printed constitution and canons of the diocese of Illinois, and of the general convention of the Protestant Episcopal church, the address of the bishop of Illinois to the diocesan convention of 1863, and his answer and letter in the case of the Rev. E. W. Hagar, should be evidence in the case.

Without asserting the power of this court in cases of this character, yet, on account of the earnest and able and elaborate argument of counsel, we will notice the objection that the spiritual court had no authority to adjudicate upon the alleged offense.

The objections are these:

First. The bishop, by a recital in the commission that the information upon which he acted was "credible information," excludes

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the hypothesis that he exercised the power of appointment in either of the three modes mentioned in section 2 of canon 20, and that he could only proceed as directed therein.

Second. That the presentment was insufficient in specification of time, place and circumstance.

Third. That eight presbyters did not appear, but only five, at the time and place of trial, when the attempted organization of the court took place; and that the accused was denied his right of challenge.

Fourth. That there was, in fact, no notice given of the trial.

Except one, these objections are extremely technical.

There is in evidence a commission, issued by the bishop, appointing three persons to investigate the charge, and make presentment. Presentment was found, containing three charges and divers specifications, as to offenses committed while officiating as rector of Christ church, in Chicago. A citation was signed by the bishop, fixing the time and place of trial, which, with a copy of the presentment, was duly served. The citation furnished the names of eight presbyters, from whom the accused might select five or three, as assessors; and allowed twelve days in which to make the selection.

Was a commission necessary to confer jurisdiction? Did the court or the accused have any right to call for it? Concede that the bishop did not obtain his information from either of the sources specified in the canon, is the jurisdiction of the court thereby ousted? The canon requires no commission to be issued. By the canon, the appointment need not be in writing. The bishop is compelled to appoint three persons to examine the case and presentment make. He performs this duty in such manner as he may choose.

If the court had jurisdiction of the subject-matter and the person, it had power to proceed. The subject-matter was contained in the presentment, not in the commission. The person had been summoned and was present. Therefore, neither the source, nor the character of the facts communicated to the bishop, except as contained in the presentment, were proper subjects of inquiry by the church court. The offense charged was the matter to be investigated—the fact to be tried. If the accused had violated the constitution of his church; his engagement to conform to its doctrines and worship; and his ordination vow, as alleged, such violations could not be palliated by the errors of the bishop. If the bishop disregarded the canons, and transcended the limits of his

power, as diocesan, he is amenable therefor, and liable to trial, before his brother bishops. His transgression cannot excuse the wrongful act of another; cannot be pleaded in justification, or to the jurisdiction. The court, then, upon presentment made and due service, had power to take cognizance of and decide the case.

The view is sustained by a careful examination of the canon Section 1 of canon 20, in prescribing the duties of the presenters, says, "if there be, in their opinion, sufficient grounds for a presentment, they shall present such clergyman to the bishop; who shall thereupon cause a copy of said presentment, together with a citation to appear and answer thereto, to be served upon the accused, with all convenient speed." Section 7 of the same canon, in reference to the duties of the presbyters who may compose the court, says, "they shall declare, in a writing to be signed by them, or a majority of them, their verdict on the several charges and specifications contained in the presentment." It will be seen that the accused is entitled to a copy of the presentment, not the commission, and to a citation. The court act alone on the presentment, and the evidence adduced.

Sustaining, as we do, the jurisdiction of the ecclesiastical court, we might fairly waive any answer to the suggested defects in the presentment, and rely upon an authority furnished by counsel. *Walker v. Wainright*, 16 Barb. 486. In that case the motion was made by the counsel for Walker, that Wainright, the bishop, be required to show cause why the injunction previously granted, restraining the sentence, in accordance with the verdict of an ecclesiastical court, could not be made absolute. The learned judge said: "The only cognizance which the court will take of the case, is to inquire whether there is a want of jurisdiction in the defendant to do the act which is sought to be restrained. I cannot consent to review the exercise of any discretion on his part, or inquire whether his judgment, or that of the subordinate ecclesiastical tribunal, can be justified by the truth of the case. I cannot draw to myself the duty of revising their action, or of canvassing its manner or foundation, any further than to inquire whether, according to the law of the association to which both of the parties belong, they had authority to act at all. In other words, I can inquire only, whether the defendant has the power to act, and not whether he is acting rightly. * * * * * The refusal of the defendant to issue a commission to take testimony, his

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refusal to grant a new trial, the alleged misconduct of one of the court, are all matters which relate to the mode of procedure, and not to the right to proceed; and I repeat, that it is the latter alone that I can take cognizance of." The motion was denied, and the injunction dissolved.

If we had the right to determine the sufficiency of the presentment, we should hold, as this court has held in numerous decisions, in criminal cases, that it is sufficient, if so plainly drawn that the nature of the offense may be understood. We should not test its correctness by the strict rules of criminal pleading.

The accused was informed by the presentment, that in his own church, in the city of Chicago, he had committed the alleged offenses. The language is explicit as to their character. The omissions and alterations are plainly set forth. The place is definitely fixed. No particular day is averred. Was this necessary? The offense charged are mostly omissions. The rule is, "Where the offense consisted of an omission, it is not necessary to allege any time to it. 2 Hawk., ch. 25, § 79. Even in criminal cases, it is not necessary to prove the time precisely, as laid. The particular day is not material in point of proof, and is merely matter of form. 1 Phillips' Ev. 214. This court has decided, that the allegation of the precise time, even in criminal cases, is not essential, unless in a few cases. *Gebhart v. Adams*, 23 Ill. 399. The presentment avers, as to time, "at divers times during the two years last past," and "at divers times during the six months last past." It was insisted, in the argument, that, as no precise day is named, therefore the accused cannot meet the charge, without summoning a large number of witnesses. He would not be aided by the averment of a particular day. If the presentment had charged the commission of the offense, on a certain day, in the month of June, A. D. 1867, the prosecution would not, by any rule of law, have been limited to the day named, but might have proved the offense — the omission — on any day between the day named and the date of the presentment. The statute of limitations would not apply, for the canon has not so provided. The highest judicature in this church has decided that there is no such law governing church trials. Bishop Onderdonk was found guilty of immorality and impurity, committed seven years prior to his trial; and the bishops of Louisiana, Rhode Island, Delaware and Arkansas, in their opinion, declared that there was no limitation to the inquiry by a church

court, as to offenses, because none had been fixed and recognized by the canons.

It is inconceivable that the accused could have been surprised by any vagueness or uncertainty in the charges and specifications. It is a reasonable presumption, that a minister has knowledge of the constitution of his church, and of his acts as such minister, of a public character, and within a recent period; and particularly his conduct and omissions in the administration of the sacraments of his church. The bill contains a virtual admission of such knowledge. The *gravamen*, in the presentment, is the omission of the words "regenerate" and "regeneration," in the ministration of the sacrament of infant baptism. The bill has no positive negation of the omission, but merely avers, "that your orator does not believe himself to have been guilty of offense and misconduct rendering him liable to trial." The fair construction of this averment is: "I am guilty of the omission; but this is no offense which renders me liable to trial." In his affidavit in support of the bill, the accused said he had informed the bishop, that "he had conscientious scruples in regard to the positive averment of the regeneration of the baptized infant by virtue of the act of baptism only." He further stated, "but this affiant utterly denies that the omission of the word 'regenerate,' from some part of the said office for infant baptism, would constitute any offense under the canons," etc. The inference is irresistible, that he was informed of the nature and cause of the accusation against him.

The third objection raises the right of challenge, and it is insisted that this right inheres in every citizen; that the common law and common justice give it. This is true in trials in all courts organized under the constitution and laws of the land. This spiritual court was not thus created. It is the creature of the canons of the church, and by them must be governed, and by them be judged. Why should we force upon this church judicatory our system, without the asking and against its consent?

The canons must control. Section 8 of canon 20 authorizes the formation of an ecclesiastical tribunal, and directs that the bishop shall furnish a list of eight presbyters to the accused, and he shall select not less than three, nor more than five, from this list, who shall constitute the court; but if he neglect or refuse to make a selection, the standing committee shall select for him. This is the mode adopted, and, by implication, excludes all other modes. Eight

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persons are presented, three or five might be rejected without cause, and to this extent a peremptory challenge is allowed.

The minister, in a legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him, he seeks it. He accepts it with all its burdens and consequences; with all the rules and laws and canons subsisting, or to be made by competent authority, and can, at pleasure and with impunity, abandon it. If they were merciful and regardful of conscientious scruples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They cannot, in any event, endanger his life or liberty; impair any of his personal rights; deprive him of property acquired under the laws, or interfere with the free exercise and enjoyment of religious profession and worship, for these are protected by the constitution and laws. While a member of the association, however, and having a full share in all the benefits resulting therefrom, he should adhere to its discipline; conform to its doctrines and mode of worship, and obey its laws and canons. If reason and conscience will not permit, the connection should be severed. "The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it." *Forbes v. Eden, infra*.

If we compel this spiritual court to observe the rule of law, as to challenge of jurors, it would be our duty to enforce the observance of all the rules of law, unless of impossible application. With the same propriety, it might be urged that twelve presbyters, the number of a jury, instead of three or five, should form the court. Why not go beyond the pale of the church, and abandon the presbyters as wholly incompetent? The canon, in the designation of presbyters as assessors, and the number, is no more emphatic than in providing the manner of selection. What law shall govern as to the number of witnesses necessary to establish an offense? Our law only requires one witness, with two exceptions; the scriptural rule requires two. The injunction of St. Paul is: "Against an elder receive not an accusation, but before two or three witnesses." The law under the old dispensation was, "One witness shall not rise up against a man for any iniquity or for any sin; at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established."

We have no right, and, therefore, will not exercise the power to

dictate ecclesiastical law. We do not aspire to become *de facto* heads of the church, and, by construction or otherwise, abrogate its laws and canons. We shall not inquire whether the alleged omission is any offense. This is a question of ecclesiastical cognizance. This is no forum for such adjudication. The church should guard its own fold; enact and construct its own laws; enforce its own discipline; and thus will be maintained the boundary between the temporal and spiritual power.

As to the fourth objection, that the notice for trial was insufficient, we have only to say, this comes too late. The party was present, and made no pretense that he had not had time to prepare for trial. As an allegation in the bill, it is too frivolous to be considered.

But it is said, that the civil rights of the Rev. Mr. Cheney are involved in this controversy; that the office of a clergyman is one of public concern; that he has a *vested* right in it; that the right to preach is, in itself, property; and that, attached to the office in question, are salary and emoluments. Has the party in this case any vested right to the rectorship of Christ Church, and, as a necessary consequence, to the profits and perquisites? No parish can form a part of the diocese of Illinois, unless with the consent of the bishop, and the formation of a constitution, as provided in canon eight, by which it "accedes to, recognizes and adopts the constitution, canons, doctrines, discipline and worship of the protestant episcopal church." The minister, having been previously ordained, and pledged conformity to the rules and doctrines of the church, is installed as rector, according to canon ten, by the production of the proper certificate from the bishop. The vestry is required, by canon twelve, to obtain the amount stipulated for his support, by "the gathering of offering in divine service, or by the procurement and collection of subscriptions, or of pew rents." It would be a mockery of language, to say that the agreement for a salary thus made constituted a vested right, a right which could not be suspended. The salary depended upon the continued performance of the duties of rector. The contract must be construed and enforced, by reference to the canons, which form a part of it. If the minister was suspended or deposed, for any ecclesiastical offense, the payment would cease. The case of the *Dutch Church of Albany v. Bradford*, 8 Cowen, 457, confirms this view. An action was brought by the minister to recover a portion of his salary.

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He had been only suspended, and insisted that his salary continued until the dissolution of the connection. In the Court of Errors, on a reversal of the decision of the Supreme Court, it was held that he was not entitled to his salary, between the sentence of suspension and dissolution; and that, as he did not and could not perform his ministerial duties, he could not recover his salary. The record, in the case at bar, discloses no contract which we can construe, except by reference to the canons.

It is also claimed that there is value in the right to pursue any lawful avocation. Of this we entertain no doubt. We have no doubt either of the absolute right of every citizen, under our constitution, to teach and preach the gospel, to whomsoever will listen. But in an organized church, with written or printed rules, and established doctrines and mode of worship, the right is qualified. The continuance, power and emoluments of the position depend upon the will of the church. The right is contingent and restricted, and, as a thing of value, is very much lessened. The sentence of the church judicatory, in a proper case, deprives of the position, and salary and emoluments are gone.

In this unhappy controversy, is involved a graver question, and of deeper moment to all christian men—indeed to all men who believe that christianity, pure and simple, is the fairest system of morals, the firmest prop to our government, the chiefest reliance, in this life and the life to come. Shall we maintain the boundary between Church and State, and let each revolve in its respective sphere, the one undisturbed by the other? All history warns not to rouse the passion or wake up the fanaticism which may grapple with the State in a deathly struggle for supremacy.

Our constitution provides, that “the free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed.” In ecclesiastical law, profession means the act of entering into a religious order. Religious worship consists in the performance of all the external acts, and the observance of all ordinances and ceremonies, which are engaged in with the sole and avowed object of honoring God. The constitution intended to guarantee, from all interference by the State, not only each man’s religious faith, but his membership in the church, and the rights and discipline which might be adopted. The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the

State shall not be justified. Freedom of religious profession and worship cannot be maintained, if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline, and regulate its trials. The larger portion of the christian world has always recognized the truth of the declaration, "A church without discipline must become, if not already, a church without religion." It is as much a delusion to confer religious liberty without the right to make and enforce rules and canons, as to create government with no power to punish offenders. The constitution guarantees the free "exercise *and* enjoyment." This implies, not alone the practice, but the "possession with satisfaction" — not alone the exercise, but the exercise coupled with enjoyment. This "free exercise and enjoyment" must be, as each man, and each voluntary association of men, may determine. The civil power may contribute to the protection, but cannot interfere to destroy or fritter away.

The civil courts will interfere with churches or religious associations, when rights of property or civil rights are involved. But they will not revise the decisions of such associations, upon ecclesiastical matters, merely to ascertain their jurisdiction. As we understand the position of the defendant in error, his civil rights are not so endangered as to require our interposition. It may not be improper to collate some of the authorities which bear upon this question. The controlling principle is declared in the 24th statute of Henry VIII, "Causes spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges." In *Baptist Church v. Witherell*, 3 Paige, 296, the chancellor said: "Over the church as such, the legal tribunals do not profess to have any jurisdiction whatever, except to protect the civil rights of others, and preserve the public peace. All questions relating to the faith and practice of the church, and its members, belong to the church judicatories, to which they have voluntarily subjected themselves." In *Lawyer v. Cipperly*, 7 Paige, 281, it is said, "the church, as to its doctrines, government and worship, is to be governed by its peculiar rules." In the case of *Gable v. Miller*, 10 Paige, 627, the learned chancellor doubted the soundness of his former decisions, but his decree was reversed by the highest court in the State, by a vote of fourteen to three. *Miller v. Gable*, 2 Denio, 492.

The same principle is enunciated in *Robertson v. Bullions*, 9 Barb 64, and *Dieffendorf v. Ref. Cal. Church*, 20 Johns. 12.

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In the case of the *German Ref. Church v. Seibert*, 3 Barr, 291, it is said: "The decisions of ecclesiastical courts are final, as they are the best judges of what constitutes an offense against the word of God, and the discipline of the church." The court of appeals of Kentucky, in *Shannon v. Frost*, 3 Ben. Monroe, 258, says: "This court, having no ecclesiastical jurisdiction, cannot revise ordinary acts of church discipline or excision." In a recent case, of *Forbes v. Eden*, Cases in House of Lords, 3d series, vol. 5, 36, decided in 1867, the Rev. Mr. Forbes alleged that he could not conscientiously obey certain canons, and that, as a consequence, he might be degraded from his office of minister, and be deprived of temporal advantages, the lord chancellor said: "Appellant does not allege any actual damage, but founds his action upon a possibility of damage hereafter," and that "it was a mere abstract question, involving religious dogmas, and resulting in no civil consequences, which would justify the interposition of a civil court." Lord CRANWORTH said: "There is no authority in the courts to take cognizance of the rules of a voluntary society, * * * save only so far as it may be necessary for the due disposal and administration of property." Lord COLONY said: "A court of law will not interfere with the rules of a voluntary association, unless it is necessary to do so to protect some civil right."

In *Gartin v. Penick*, in the court of appeals of Kentucky, in 1869, Judge ROBERTSON, who delivered the opinion of the court, said: "Christianity, though an essential element of conservatism, and a great moral power in the State, should only work by love, and inscribe the laws of liberty and light on the heart; and the civil government has no just or lawful power over the conscience, or faith or form of worship, or church creeds or discipline, as long as their fruits neither unhinge civil supremacy, demoralize society, or disturb its peace or security." In reference to church members he said: "They joined the church, with a knowledge of its defined powers, and as the civil power cannot interfere in matters of conscience, faith or discipline, they must submit to rebuke or excommunication, however unjust, by their adopted spiritual rulers."

In the only case in this court, in which this question has been adverted to, the court says: "While we will decide nothing affecting the ecclesiastical rights of a church, which we are not competent to do, its civil rights to property are subjects for our examination,

to be determined in conformity to the laws of the land, and the principles of equity." *Ferraria v. Vasconcellos*, 31 Ill. 25.

There are some authorities in favor of interference, but the cases collated declare the law, as we think it ought to be. We have been referred to numerous cases in Massachusetts. The constitution of that State, from 1780 to 1833, made it the duty of the legislature to "require the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily." Const. Mass., part 1, art 3. Laws were passed for the purpose contemplated, and an ecclesiastical law has thus grown up there. These decisions are not applicable in this State, as legislative and judicial interference in such matters is expressly forbidden by the constitution, which all are bound to obey.

This case may, then, be briefly summed up. A rector in the church is charged with non-conformity to its doctrines; intentional omissions in the ministration of its ordinances; and the attempt is made to organize a court, composed of his brother clergymen, for his trial. He appeals to the civil court, and alleges, as the chief reason for interposition, the want of authority in the spiritual court to try him, and a misconstruction of the canons. The same point was made to that court, and its power denied. It was urged, with the same earnestness, and enforced with the same arguments there as here. That court overruled the objection, and decided that it had jurisdiction. Five intelligent clergymen of the church, presumed to be deeply versed in biblical and canonical lore, were more competent than this court to decide the peculiar questions raised. Why should we review that, and not every other decision, which involved the interpretation of the canons? It is conceded, that when jurisdiction attaches, the judgment of the church court is conclusive, as to purely ecclesiastical offenses. It should be equally conclusive upon doubtful and technical questions, involving a criticism of the canons, even though they might comprise jurisdictional facts.

It requires no more intellect, information or honesty to decide what is an ecclesiastical offense, than to determine the authority of the court according to the canons. The distinction is without a difference.

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Civil courts have duties and responsibilities devolved upon them, and a well-defined jurisdiction to maintain. The church has more solemn duties, more weighty responsibilities, and an authority granted by the infinite Author of all things. We shall not enter in and "light up her temple from unhallowed fire." The ministers selected to sit in judgment on the acts of a brother ought to be impartial and competent, prompted, as they doubtless are, by the teachings of Divine revelation, and the kindly influences of christian charity, which "suffereth long and is kind; beareth all things, believeth all things, hopeth all things, endureth all things."

Having given this case a most careful consideration, our deliberate judgment is, that the ecclesiastical court ought not to be restrained by the mandate of this court.

It is ordered that the decree of the superior court be reversed, the injunction dissolved, and the bill dismissed.

Decree reversed.

LAWRENCE, C. J., and SHELDON, J. We concur in the decision of the case at bar, announced in the foregoing opinion, and we also concur in the opinion itself, except as to one principle therein. We understand the opinion as implying that, in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary, as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts. This is a principle of so grave a character, that, believing it to be erroneous, we are constrained to express our dissent upon the record.

We concede, that when a spiritual court has once been organized in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and the subject-matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is, that the association is purely voluntary, and when a person joins it, he consents that for all spiritual offenses he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized, and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood by the action of a

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spiritual court, unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable, upon principle and authority.

CASES
IN THE
SUPREME COURT
OF
IOWA.

STAPLETON v. KING, appellant

(28 Iowa, 28.)

Evidence — parol testimony — receipt. Partnership.

While parol evidence is admissible for the purpose of explaining a receipt this exception to the general rule, respecting the inadmissibility of such evidence to vary the terms of a written instrument, must be strictly confined to instruments which are purely receipts, and will not be extended to an instrument which embraces or is in its nature a contract.

Where two persons entered into a contract jointly, for the keeping of sheep for certain shares of the wool, it was *held*, that they would be so far regarded as partners as that a settlement made by one of them, in the name of both, would bind both.

THE plaintiff alleged in his petition that the defendants entered into a written contract with plaintiff and Josiah Thompson, by which plaintiff and Thompson delivered to defendants 854 head of sheep, which defendants agreed to take good care of, to keep up the number of the flock, and to deliver to plaintiff and Thompson, annually, at shearing time, two pounds of well washed wool per head; that, for the years 1865, 1866, 1867, 1868 and 1869, the defendants failed to deliver wool, according to the terms of their agreement, on account whereof they are indebted in the sum of \$1,200; that said contract, and all due thereon, was assigned by Thompson to plaintiff on the 23d day of December, 1868.

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The defendants, for answer, denied that there is due from them, for failure to deliver wool, as alleged, the several sums claimed. By way of counter-claim, they alleged that the sheep were warranted sound; that they were affected with scab, by reason whereof they have sustained damage in the aggregate amount of \$3,000. For this they prayed judgment. The replication denied the warranty, and alleged that all claims for damages, on account of the alleged disease of the sheep, had been fully settled. As evidence of this settlement, the plaintiff attached to his petition, and introduced in evidence, a receipt as follows:

“Received of Pearson A. King and John Porter, two hundred and sixty-five pounds of the wool due on one hundred and seventy-seven of the sheep said King and Porter got of us, on joint contract, the fall of 1864. And the abatement thus made is to settle all difficulty of alleged disease in said sheep.

“DAVID STAPLETON,

“FOR STAPLETON & THOMPSON.”

A copy of the receipt was retained by Stapleton, to which was attached the following statement:

“The above is a true copy of a receipt taken of David Stapleton and Josiah M. Thompson, as dated above.

“PEARSON A. KING,
“JOHN PORTER.”

It was shown that the name of Porter was attached to this statement by Pearson A. King. Evidence was introduced tending to show that King refused to sign the statement; and that Stapleton said it was only a receipt; and that a copy could not, and should not, prejudice his rights; that he only wanted it to show how much wool he got; and that nothing was said at that time about a settlement. The written agreement of the parties was introduced in evidence, and it sustained, substantially, the averments of the petition with reference thereto. The court instructed the jury that the contract was joint; that defendant King had authority to make the subsequent contract, or to receive and accept what is called the receipt, of the date September 23, 1865, and, by that act, bind Porter, whether Porter assented to it or not; and that any statement made orally, by either party, at the time of, or before the delivery of the paper containing said settlement, as to reservation of legal rights,

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or other verbal statements or stipulations could be considered. The court refused to give, at the request of the defendant, instructions involving the contrary of the above doctrine.

The jury returned a verdict for plaintiff for \$95.23. Motion for new trial was overruled. The defendant appealed, and assigned for error the giving of the instructions above referred to, and the refusing to give those asked.

Clark & Haddock, and Templin & Son, for appellant.

Fairall, Boal & Jackson, and Edmonds & Ransom, for appellee.

DAY, Ch. J. The principal question involved in this case is, whether the exhibit attached to the defendant's answer, and by counsel denominated a receipt, a writing, and a contract, may be explained by parol testimony, by showing what occurred at the time of its execution. The rule is well settled that parol contemporaneous evidence is not admissible for the purpose of explaining, varying or adding to a valid written contract, but that a simple receipt may, by such testimony, be explained and even contradicted. The only difficulty in the case is to determine to which class the writing in question belongs. Appellant insists that it is subject to explanation by parol proof, and cites numerous authorities, which, however, do no more than sustain the general proposition that a receipt may be explained, and hence, afford but little aid in the solution of the question involved.

The nature of this instrument can be determined by a comparison of it with others which have received judicial construction. In *Van Ostrand v. Reed*, 1 Wend. 424, it was held, that where a party, on the sale of an article, makes representations amounting to a warranty, and the sale is consummated by a written transfer, without warranty, the writing is presumed to contain the entire agreement, and parol evidence, as to the warranty, is not admissible. In *Creery v. Holly*, 14 Wend. 26, where a clean bill of lading was given, it was held that parol evidence is not admissible to prove an agreement, that the goods might be stowed *on deck*, it being conceded that the general usage requires goods to be stowed under deck in the absence of agreement. *Kellogg & Dumont v. Richards & Sherman*, 14 Wend. 116, where, upon a compromise being made, the creditor indorsed upon a note he held against his debtor, that he

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had received the note of a third person, as a compromise for the *full payment of the note* of his debtor, and afterward brought an action against his debtor, and offered to prove that, at the time of the compromise, the debtor *verbally agreed* to make a further payment, in addition to the note transferred, so as in the whole to pay one dollar in the pound, it was *held*, that such evidence was inadmissible, as varying the written agreement between the parties. In this case the court said: "That a technical receipt can be explained by parol evidence, and is, in this respect, an exception to the general rule of evidence applicable to written instruments, has been repeatedly ruled and acted upon by this court. * * * The relaxation of the rule of evidence, above referred to, should not be extended beyond the spirit of the terms in which it is expressed, and must be confined to the case of a receipt in the strict sense of that term."

In *Babcock v. May*, 4 Ohio, 346, salt was shipped upon a vessel, and a bill of lading was executed for the transportation of the same, by the most direct route, from Buffalo to Cleveland. The vessel deviated from the direct route, and the salt was lost. Defendants sought to avoid the effect of the bill of lading by parol proof, that it was part of the agreement that the schooner might touch at Otter Creek, a place out of the regular course. The court said: "That a receipt may be explained by parol evidence is a principle too familiar to require authority for its support. The bill of lading is a contract, including a receipt. It is a contract admitting the reception of certain goods, with an agreement to carry them to the port of discharge, and the only doubt in the case is whether the terms of this agreement, as reduced to writing in the bill of lading, can be varied by parol. If the actual reception of the salt by the master was the point in controversy, a different question would be presented. Such a case might come within the general rule of law, applicable to all receipts. But, in this case, it is agreed by all parties that the salt was actually received by the defendants or their agent, and the only question is, whether the agreement for the transportation of the salt can be changed by parol testimony." And it was held that it could not be so changed.

In *Stone v. Vance*, 6 Ohio, 246, an instrument of the following form was involved:

"Received, Dayton, January 6, 1830, of Jacob L. Vance, a note, signed by himself, Abraham Harrison, and Reuben Pore, payable at

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the Franklin bank, of Columbus, in four months from January, 1830, for \$600, which note, if discounted at said bank, \$500 is to be applied to said Vance's credit, with the late firm of Stone & Bostwick." In construing this instrument the court said: "It is claimed that this paper, executed at the time between the parties, is to be considered as their entire contract, in relation to the note; that it cannot be enlarged, restrained, contradicted nor varied by parol testimony of any agreement made *before* or at the time of its execution, unless there is some latent ambiguity. This is, in our view, a well-settled principle, and one which ought not to be overthrown."

In *Barber v. Brace*, 3 Conn. 9, where the master of a vessel gave to the shipper of goods a writing acknowledging the receipt, and stating that they were to be transported to the place of destination at customary freight, dangers of sea excepted, it was held that a parol agreement between the shipper and master, before and at the time of giving the writing, as to the mode of stowing the goods, was inadmissible to show the terms of the shipment, as all such considerations are to be considered as merged in the writing. Sustaining this view see, also, Phillips on Evidence, Cowen, Hills and Edwards' Notes, p. 391, No. 131.

In *Niles v. Culver*, 8 Barb. 207, an instrument in the following form: "Received in store, on account of Ira D. Richmond, from Justices NILES, two hundred and forty-five barrels of apples, to forward to New York, at forty-four cents per barrel, and advanced ten dollars and cartage," was held to constitute a contract, and to contain all the stipulations of the parties, and that parol evidence was not admissible to add thereto. In *Goodyear v. Ogden & Pearl*, 4 Hill, 104, an instrument in form as follows: "Genoa, September 22, 1841. Received of Ives Goodyear, 40½ bushels wheat *in store*," was held to constitute a contract of bailment, and that parol evidence was not admissible to prove a sale. Sustaining the same view, see *Wakefield v. Stedman*, 12 Pick. 562; *Bursley v. Hamilton*, 15 id. 40.

These cases show how cautious courts have been in extending the exception to the rule inhibiting parol evidence for the explanation or contradiction of a written instrument. The writings construed in many of those cases partake less of the nature of a contract than does the instrument in question in this case. The writing involved in this case acknowledges the receipt of a less quantity of wool

than that due, and stipulates that an abatement of the remainder has been made. Certainly this stipulation as to abatement constitutes a contract, binding upon the party making it. But the instrument goes further, and specifies the consideration of this abatement; it "is to settle all difficulty of alleged disease in said sheep." It is not claimed that the wool was not received, or that the quantity received differed from the amount stated; evidence to establish these facts would be admissible. It is conceded that the quantity of wool specified in the receipt was delivered, and that it was received in lieu of a greater amount then due. Defendants admit the stipulation upon the part of plaintiffs, and seek to prove by parol that they did not enter into the agreement which constitutes the consideration of the stipulation of plaintiffs. To allow this to be done would be a direct violation of the principles of the authorities cited, and an infraction of a well-established and salutary rule of law. We conclude, therefore, that the court did not err in instructing the jury that they could not consider any verbal statements or stipulations made before or at the time of the delivery of the paper in question.

II. As to the authority of Pearson A. King to bind his co-defendant, Porter, by his acceptance of the writing in question. Of this we entertain no doubt. The contract for the keeping of the sheep was made with them jointly. Afterward they divided the sheep, each one taking one-half under his immediate charge. But they could not then, by their own acts, without the concurrence of plaintiffs, make that two distinct agreements, which they contracted with plaintiffs should be but one. If the defendants then had brought an action against the plaintiffs for a breach of their contract, it would have been necessary for them to join in the action. And where several plaintiffs must join in bringing a personal action, a release by one joint plaintiff is a bar to the action. *Austin v. Hall*, 18 Johns. 286; *Decker v. Livingston*, 15 id. 478; *Myrick v. Dame*, 9 Cush. 248. Besides, Porter is accepting the benefits of this agreement, so far as it exonerates him in part from his agreement to deliver two pounds of wool per head of sheep. Upon what principle can he accept its benefits and be discharged from its burdens? The case mainly relied upon by appellant, in opposition to the right of King to bind Porter, is *Bancher v. Cilley, Ex'r*, 38 Me. 553. Cilley and Carey were keeping a hotel. Cilley, in the presence of Carey, made a purchase of liquors on their joint account on credit.

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Cilley having deceased, an action was brought against his executor for the price of the liquors. The defendant contended that Cilley and Carey were partners, and that the action should have been brought against the survivor. It was held that they were not necessarily partners as between themselves, and that as plaintiff did not seek to charge them as partners, it was not necessary to decide whether they might be regarded as partners as to third persons. To this it may be replied, first, that a partnership is not necessary, in order to enable one party to release a right of action, which shall be binding upon another; that a mere joint contract is sufficient for that purpose; second, that the case does not decide that the parties were not partners as to third persons.

The instruction that the contract is joint, and that King had authority to make the subsequent contract, and accept what is called the receipt, and by that act bind Porter, is, in our opinion, proper.

Judgment affirmed.

THE STATE v. WEIR, appellant.

(28 Iowa, 134.)

Constitutional law — legislative power — local option law.

The legislature have no power to make the operation or repeal of a law dependent upon a vote of the people. Therefore, *held*, that an act prohibiting the sale of ale, wine, etc., the operation of which is made dependent upon the vote of the people in each county, was unconstitutional. (*See note, p. 117.*)

AN information before a justice of the peace was filed against the defendant, accusing him of keeping for sale, in violation of law, a keg of beer.

The defendant filed a motion to dismiss the cause, upon the grounds that chapter 82, acts thirteenth general assembly, is unconstitutional and void, and that said act was never adopted by the legal voters of Cerro Gordo county. The motion was overruled. The cause was heard, and the defendant was fined \$25 and costs. Upon appeal to the district court, the judgment of the justice was affirmed. Defendant appeals.

Hartshorn & Flint and Charles Mackenzie, for appellant.

H. O'Connor, attorney-general, for the State.

DAY, C. J. It has been held by this court that the general assembly cannot legally submit to the people the proposition whether an act should become a law or not, and that the people have no power, in their primary or individual capacity, to make laws. They must do this by representatives. *Santo et al. v. The State of Iowa*, 2 Iowa, 203; *Geebrick v. The State of Iowa*, 5 id. 492. In the former case, it was held that section 18 of the act for the suppression of intemperance, approved January 22, 1855, did not, in its largest and broadest sense, submit to the people of the State the question whether such act should become a law; and that the act, without the ratification of the people, would have taken effect as a law. In the latter case, it was held that the act to license and regulate the sale of malt, spirituous and vinous liquors (chapter 222, Laws of 1857) receives its vitality and force from a vote of the people, and is, therefore, unconstitutional and void. That act contained general provisions for licensing the sale of liquors, and repealed all acts and parts of acts then in force coming in conflict with its provisions; but provided, "that the act entitled 'An act for the suppression of intemperance,' approved January 22, 1855, be not and is not by this act repealed in any county of this State, unless the people of such county, by a vote taken as herein provided, shall adopt this act. The effect of a vote in favor of the act of 1857, it was held, was two-fold. First. To repeal the provisions of the act of 1855. Second. To give force and efficacy to the act of 1857. It is impossible, in principle, to distinguish the act of 1870 from that of 1857, or to discover how a vote in its favor can be productive of different results. The act of 1870 makes it unlawful to sell ale, wine, malt liquors or beer, except as provided in chapter 64 of the Revision of 1860, and establishes the same penalties and mode of procedure for its violation as are provided in said chapter 64 of the Revision for the unlawful sale of intoxicating liquors. Section 8 of the act provides for the submission at a general election, to the legal voters of a county, the question of the adoption of the provisions of the act, and enacts that "if a majority of all the votes cast at such election in said county be 'for prohibition,' then, *and not otherwise*, shall the provisions of

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this act be in full force in said county, from and after the first Monday in January next following such election." * * * "And if a majority of the votes cast be 'against prohibition,' then, and in that case, chapter 64 of the Revision of 1860 shall remain and be in force in such county, and this amendatory act *shall be null and void in such county.*" Now, it is apparent that, by express declaration of the legislative will, no change is to be effected in the existing law of any county, until its provisions are adopted by a majority of the legal voters at a general election. If no vote be taken, chapter 64 of the Revision remains in force. If a vote be taken, and a majority of the votes cast be against prohibition, the provisions of chapter 64 of the Revision remain in force, "and this amendatory act shall be null and void in such county."

Under section 1583 of the Revision, the sale of beer is lawful. The act of 1870 makes the sale of beer unlawful. The effect of a vote in favor of the act of 1870 is to adopt a provision in direct conflict with section 1583, and hence to repeal it by necessary implication. In *Geebrick v. The State, supra*, it is held that "a law can no more be repealed than it can be made by the vote of the people."

The act of 1870 further provides: "Section 2 of chapter 154 of the laws of the twelfth general assembly is hereby repealed, so far as it relates to counties adopting the provisions of this act, but to none other." It is apparent that this repealing clause can be vitalized only by the vote of the people. Without such vote, it remains lifeless and inactive. But it seems unnecessary to further consider the provisions of this act. It falls so completely within the principles and reasoning of *Geebrick v. The State*, that it seems only necessary to refer to that case to show the unconstitutionality of the act in question.

It becomes unnecessary to consider whether the act was adopted by the legal voters of Cerro Gordo county.

Judgment reversed.

NOTE. — The supreme court of New Jersey, in *State v. Morris Common Pleas*, 12 Am. L. Reg. (N. S.) 32, decided that a "local option law" prohibiting the sale of intoxicating liquors without license, and providing that whether or not licenses shall be granted in any township, shall be dependent upon the vote of the township, was constitutional, and that the people or municipal corporations may lawfully be invested with authority to regulate or prohibit the retailing of intoxicating drinks. The court said: "It must be conceded that this law can have no sanction if it is a delegation of the law-making power to the people of the township. If the right to declare what the law shall be in one case may be referred to the people, the right to do so may be given

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in all cases, and thus the legislature may divest itself wholly of the power lodged in it by the fundamental law, until, by subsequent legislation, it shall be resumed. It is also obvious that it is not competent to delegate to the people the right to say whether an existing law shall be repealed or its operation suspended. To say that what is now the law shall not hereafter, or shall not for a specified time be the law, is in effect to declare the law to be otherwise than it now is, and is a clear exercise of the law-making power. The will of the legislature must be expressed in the form of a law by their own act. If it is left to the contingency of a popular vote to pronounce whether it shall take effect, it is not the will as the law makers, but the voice of their constituents which molds the rule of action. If the vote is affirmative, it is law: if in the negative it is not law; the vote makes or defeats the law, and thus the people are permitted unlawfully to resume the right of which they have divested themselves by a written constitution, to declare, by their own direct action, what shall be law. The cases upon this subject, so far as they assert the principle above stated, have my entire concurrence. *Parker v. Commonwealth*, 6 Barr. 507; *Rice v. Foster*, 4 Harrington, 479; *Maise v. State*, 4 Ind. 343; *State v. Parker*, 26 Vt. 357; *Santo v. State*, 3 Iowa, 168; *Pater-son v. Society, etc.*, 4 Zab. 885." But the court regarded the act in that case as a delegation of the power to make police regulations and not a delegation of the legislative power, and held it to be constitutional. See, to the same effect, *Com. v. Bennett*, 103 Mass. 37.

See, for an able and elaborate discussion of the subject, Cooley's Const. Lim. 110.—RMR.

TEGLER, appellant, v. SHIPMAN.

(33 Iowa, 194.)

Contract. Lex loci contractus. Intoxicating liquors.

If an agent of a person engaged in the sale of liquors in another state, merely takes an order of a person residing in Iowa for a quantity of liquor to be forwarded to him, which order is made upon and subject to the approval or disapproval of his principal, the sale will be regarded as made in the state where the principal resides, and the case will not fall within the statute of Iowa, making void contracts for or on account of intoxicating liquors.*

ACTION upon two promissory notes for \$156.90 each, and payable one in thirty, and one in forty days, with ten per cent interest; made by the defendant to the plaintiffs, and dated Jefferson (Greene Co.), March 23, 1870. The defendant for answer averred that the notes were made and delivered at Jefferson, Iowa, and the only consideration therefor was intoxicating liquors sold by plaintiffs to defendant, in Iowa, in violation of and with intent to enable defendant to violate the act for the suppression of intemperance. And the defendant also set up a counter-claim for \$434.68 for money paid by

* See, to same effect, *Hill v. Spear*, 9 Am. Rep. 205, wherein the same question is elaborately discussed by the supreme court of New Hampshire.—RMR.

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defendant to plaintiffs for intoxicating liquors sold by plaintiffs to defendant in violation of law, and with the intent to enable defendant to violate the law for the suppression of intemperance, etc. The plaintiffs for replication denied that they sold to defendant any intoxicating liquors in Iowa, and aver that all sales were made in Illinois pursuant to the laws of that State, and without any intent on the part of the plaintiffs to violate or evade any law of Iowa.

There was a trial to a jury, which resulted in a verdict and judgment for defendant for costs. The plaintiffs appeal. The further facts are stated in the opinion.

Jackson & Potter, for appellants.

McDuffie & Hall, for appellee.

COLE, J. [after deciding a question of practice]. The defense was grounded upon Revision, section 1571. * * * "All sales, transfers, conveyances, mortgages, liens, attachments, pledges and securities of every kind, which, either in whole or in part, shall have been made for or on account of intoxicating liquors sold in violation of this act, shall be utterly null and void against all persons in all cases, and no rights of any kind shall be maintained in any court in this State for intoxicating liquors, or the value thereof, sold in any other State or country, contrary to the law of said State or country, or with intent to enable any person to violate any provision of this act." * * *

The testimony in the case tended to show that the plaintiffs were wholesale liquor merchants in Rock Island, Illinois; and employed an agent to travel for them, and gave to him general authority to procure orders for liquors on their house; and that most or all the liquors purchased by defendant of the plaintiffs were ordered at Jefferson, Iowa, through this agent, and shipped on board of the cars at Rock Island, Illinois, to the defendant at Jefferson, Iowa, he paying freight and charges, and taking the risk of leakage, etc. There was conflict in the evidence as to whether plaintiffs knew that defendant intended to sell the liquors in violation of law. The evidence does not disclose with any definiteness whether the agent had authority to make a sale of the liquors or only to take an order for them, to be filled or not at the option of his principals; nor does it appear directly which course was pursued in this case.

On motion of the defendant's counsel, the court instructed the jury as follows: "If the jury find from the evidence that the plaintiffs, or their agent, took the order or orders for the liquors sued for in this case, in this State, then the contract was made in this State." And the court refused to give the following instruction, asked by plaintiffs: "The jury are instructed that if they believe from the evidence that the order or orders, some or all of them, on the plaintiffs, were procured by their agent for procuring orders in the State of Iowa, and that said orders were given by the defendant on the plaintiffs, who were doing business at Rock Island, in Illinois, subject to their approval or disapproval, then no sale would take place until the orders were accepted or approved by them in Rock Island, and the place of contract would not be by such order determined to be in Iowa; that the mere giving of an order does not fix the place of contract." The giving of the first above, and the refusal to give the latter, were duly excepted to, and are now assigned as error.

We are of the opinion that the court did err, both in giving the one and in refusing the other. It is well settled that to constitute a contract requires both the making and the accepting of a proposition; that is, there must be a concurrence of two minds upon the same thing. Where an order or offer is made by letter, it does not constitute a contract until it is accepted. When it is accepted, and the letter containing the acceptance is placed in the mail, the contract as specified in the order or offer is complete, and it is very plain, upon principle, that the contract is made where it is accepted, and not where the offer was made; for it is there that the two minds meet upon the same thing, and the contract is consummated. This has been so adjudicated. *McIntyre v. Parks*, 3 Metc. 207; *Whiston v. Stodder*, 8 Mart. (La.) 132; see, also, 2 Pars. on Cont. 586. Hence, if the agent only "took the orders for the liquors sued for in this State," but did not contract the sale of them here, it was not a contract made in this State. To take an order for liquors is one thing, and to agree to accept the order, and to fill it, is quite another; the former is a proposition, while the latter is the consummation of a contract. So much as to the instruction given.

The instruction refused states exactly the legal proposition we have undertaken to illustrate. That is to say, if the order for liquors made in Iowa was subject to the approval or disapproval of the plaintiffs, they did not become bound by the order as a contract until they approved or accepted it; and if they made the approval

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or acceptance at Rock Island, then, upon the principles before stated, it was a Rock Island contract. In the language of the instruction itself, "the mere giving of an order does not fix the place of contract."

It is proper to remark that the court gave the counterpart of the refused instruction above set forth. The instruction given was: "If the jury find that an agent of the plaintiffs came here and offered to sell intoxicating liquors to the defendant, and the defendant agreed to take them and the price was agreed upon, and the terms of freight, and that defendant had no license to deal in such liquors from the proper court of the State, the jury will find for the defendant." This, having been given, rendered the giving of the above necessary in order to present the jury with the law as applicable to the alternatives of fact properly deducible from the evidence.

From what has already been said, it is evident that the third instruction asked by plaintiffs should also have been given. The plaintiffs also asked an instruction, being the second of their series, to the effect that the mere knowledge that a party to whom intoxicating liquors were sold intended to resell the same in the State of Iowa contrary to law is not enough to avoid or vitiate the contract; but there must also be proof that they sold them with the intent to enable the defendant to violate the act, etc. This was refused, we think, rightly so. We do not hold, however, that the mere knowledge would necessarily vitiate or avoid the contract; but it is a fact from which the jury might infer the intent—especially where the other circumstances attending the manner of acquiring that knowledge was taken into consideration. The other instructions were rightly given. The question as to the effect of a sale with intent to enable another to violate a law of this State is to be determined under our statute and not upon the rules of State comity.

The pivotal question in the case is as to where the contract was made. If the agent sold the liquors to the defendant in Jefferson, and forwarded to his principals a statement of such sale for them to fill by forwarding the liquors specified, then it was an Iowa contract, and if the plaintiffs had no license to sell such liquors here, then they cannot recover. If the agent simply took an order from defendant upon his principals in Rock Island, which they might fill or refuse at their option, it was a Rock Island contract, and the plaintiffs can recover unless it is shown that they sold the liquors

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with intent to enable the defendant to violate the provisions of the act for the suppression of intemperance.

Judgment reversed.

STATE v. MORPHY, appellant.

(28 Iowa, 370.)

Criminal law. Homicide — neglect of wound. Jury — intoxicating liquors.

The fact that a juror, in a prosecution for homicide, during the progress of the trial used intoxicating liquor, combined with other curative agents, as a medicine, without medical advice, will not vitiate the verdict in the absence of any showing that it was so used without the knowledge of the prisoner or his counsel, or that its effects were intoxicating.*

If death ensues from a wound given in malice but not in its nature mortal, but from which, being neglected or mismanaged, the party dies, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death. (*See note, p. 125.*)

THE defendant was indicted for murder in the second degree. He was charged with having cut and wounded one B. B. Watts upon the head with a knife on the 7th day of October, 1870, of which wounds the said Watts thereafter died. The defendant was tried by a jury and found guilty. From the judgment and sentence upon the verdict the defendant appeals.

Cloud & Broomhall and Bird & Tatlock, for appellant.

Frank Springer, with H. O'Connor, attorney-general, for the State.

COLE, J. [after deciding some unimportant questions].

III. It is next assigned as error that the court refused to set aside the verdict of the jury on the ground that one of the jurors drank intoxicating liquor during the progress of the trial. The affidavits as to the fact that the juror did so drink are not set out in full in the abstract. So far as we are able to determine the circumstances

* See *Davis v. State*, 9 Am. Rep. 760, and note thereto.

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upon the abstract and arguments they are, that one of the jurors, not in the habit of drinking, was ill during the trial, and took for medicinal purposes, without medical advice or prescription, some brandy and blackberry balsam or mixture; that it was done during the hearing of the case and not after the jury retired. There is no showing or claim that its effects were intoxicating or other than remedial; nor is it shown that the facts concerning it were not well known to defendant and his counsel at the time and before the cause was submitted to the jury. The case is not, either in its facts or principles, within *The State v. Baldy*, 17 Iowa, 39, nor *Ryan v. Harrow*, 27 id. 494, and there was no error in the action of the court in this respect.

[The court here passed upon some exceptions to the instructions, and continued].

VI. There was evidence tending to show that the deceased was not well cared for or nursed after he was wounded; and that by the use of intoxicating liquors and other causes his chances for recovery were materially lessened. Having reference to this testimony, the defendant asked instructions four, seven and nine, which were refused. These instructions, in as many forms, asked the court substantially, to instruct the jury that if they had a reasonable doubt that the death of Watts was strictly and clearly traceable to the wounds and not dependent on any other cause, they should acquit. The court not only refused these but gave the following: "21. If you find from the evidence that the defendant inflicted the wounds upon the person of Watts, as charged in the indictment, if such wound or wounds so inflicted by the defendant caused or contributed to the death of said Watts, then the prisoner cannot be excused because other causes may have also contributed to his death. If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged, the party dies, this will not excuse the prisoner who gave it; but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death.

The last sentence of this instruction from the words "if death ensues," is a literal extract from Greenleaf on Evidence (see vol. 3, § 139). The same, in substance, may also be found in 1 Russ. on Crime (ed. of 1841), 428; id. (4th Am. ed.) 428, 429; id. (7th Am

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ed.) 505; Roscoe's Cr. Ev. (8d ed.) 703, 706; 1 Hale's P. O. 428. And the doctrine embodied in the extract was carefully considered and thoroughly examined and approved by the supreme court of Massachusetts in *Commonwealth v. Hackett*, 2 Allen, 136, in an opinion by BIGELOW, C. J. The cases were referred to and stated, and it was said in the opinion that "we find the authorities to be clear and uniform, from the earliest to the latest decisions. * * * It is certain that the rule of law, as stated in the authorities, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime and to take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant upon the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment." The cases cited in the opinion are, *The King v. Reading*, 1 Keb. 17; *Row's case*, stated in 1 East's P. C., ch. 5, § 13, *Regina v. Holland*, 2 M. & Rob. 351; *Commonwealth v. Green*, 1 Ashm. 289; *Regina v. Haines*, 2 Car. & Kirw. 368; *State v. Baker*, 1 Jones' Law R. (N. C.) 267; *Commonwealth v. M'Pike*, 3 Cush. 181. In view of this current and weight of authorities, it is not strange that the court gave the instruction, nor that we should feel constrained to approve it.

But there is one peculiar phrase of the instruction given and in that part copied from 3 Greenl. on Ev., § 139, which we do not find to have a direct and express support in any of the cases examined by us. It is that part which says "unless he can make it clearly and certainly appear," etc., whereby the burden of proof is cast upon the defendant. And it is claimed, that under the modern rule the burden of proof is never cast upon the defendant. The case of *Tweedy v. The State*, 5 Iowa, 433, and the case of *Commonwealth v. McKie*, 1 Gray (Mass.), 61; S. C., 1 Lead. Cr. Cases, 347, are cited in support of this so-called modern rule. The general proposition underlying these cases is, that the State has the burden of proof, to show, beyond a reasonable doubt, the guilt of the accused; hence, any negative matter, such as the absence of self-defense, the want of sufficient provocation, etc., must be shown by the State, and the defendant cannot be held to have the burden of proof cast upon him to show such matters. It is not our purpose to now enter into

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any discussion of this general question. We only remark that whenever the matter of defense is wholly disconnected from the body of the offense charged, is distinct affirmative matter, the general rule, as above stated, does not properly apply; but in such cases the burden of proof does rest upon the accused. See *The State v. Felter*, 32 Iowa, 49.

Judgment affirmed.

NOTE.—In *Reg. v. Rew*, Kel. 28, it is said: "Edward Rew was indicted for killing Nathaniel Rew, his brother; and upon the evidence it was resolved that if one give wounds to another, who neglects the cure of them, or is disorderly and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according as the case is; because if the wound had not been, the man had not died, and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them."

If the wound is the proximate cause of the death, it is no defense that the deceased might have recovered if he had used proper care himself, or if greater care or skill had been shown in his treatment. *Commonwealth v. Green*, 1 Ashmead, 289; *United States v. Warner*, 4 McLean, 464; *McAllister v. State*, 17 Ala. 434; *State v. Baker*, 1 Jones, 267; *State v. Scott*, 13 La. Ann. 274; *Com. v. Hackett*, 2 Allen, 128.

Where a wound is willfully and without justifiable cause inflicted and ultimately becomes the cause of death, the party who inflicted it is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. *Reg. v. Holland*, 3 M. & Rob. 351; and see *Reg. v. West*, 2 Car. & K. 784. So, also, if the person would have died from some other cause already operating, yet if the wound hastened the termination of life this is enough. 1 Hale's P. C. 423; *State v. Morea*, 3 Ala. 275; *Reg. v. Murton*, 3 F. & F. 492. So where a wound brings on a fever, which is the immediate cause of death. *Ib.* So where the prisoner beat the deceased with a heavy stick and left him exposed, though alive, on a cold night, and death ensued, held to be manslaughter. *Reg. v. Marten*, 11 Cox, 126.

But where the wound was not of itself mortal, and the party died solely of the improper treatment, the result is otherwise. *Parsons v. State*, 21 Ala. 800; but see 2 Bligh. Crim. Law, 689. Where a judge charged the jury that if one person inflicts a mortal wound, and before the assailed person dies another person kills him by an independent act, the former is guilty of murder; this was held to be error. *State v. Foster*, 5 Jones' N. C. 420. — REP.

HUBBARD V. THE HARTFORD FIRE INSURANCE CO., appellant.

(33 Iowa, 285.)

Insurance — commencement of policy — agreement to issue policy — breach of condition against other insurance — incumbrances.

A applied to defendant's agent for insurance on his property on the 18th of the month, and it was agreed that the agent should issue and send to A the policy on that day. The policy was, in fact, issued on, and bore the date of that day, but was not delivered to A, nor the premium paid until the 22d of the month. The policy contained a condition that it should be void in case of prior or subsequent insurance. On the 21st of the same month

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A applied to the agent of the P. company for insurance on the same property, and the terms were agreed on and the premium paid. The agent of the P. company, having no blanks for policies, agreed to send a policy to A, and gave him a receipt specifying the property to be insured. The usual policies of the P. company contained a condition of avoidance in case of other insurance. Neither company was informed of the transaction with the other. On the 26th of the month the insured property was burned. As soon as the P. company was informed of the policy issued by defendant, it treated its contract with A as void. In an action on the policy issued by defendant, *held*, (1) that the policy became operative and binding from the day it was issued, though not delivered, and was, therefore, prior to the P. company's contract; (2) that the effect of the receipt given by the agent of the P. company was to bind the company the same as if a policy, with the ordinary conditions, had been issued; (3) that the contract with the P. company being void by reason of the prior insurance, and being so treated by the company, did not amount to a breach of the condition in defendant's policy against subsequent insurance.

ACTION upon a policy of insurance issued to C. K. Howe against loss by fire to the amount of \$2,800 on his stock of hardware and tinware, and, subsequently to the destruction of the property insured by fire, assigned to plaintiffs. Upon a trial to a jury there was a verdict and a judgment thereon for the amount of the policy and interest. Defendant appeals. The facts of the case are set out in the opinion.

Adams & Robinson and O. P. Shiras, for appellant.

Miller & Miller and Griffith & Knight, for appellee.

BECK, J. The policy, which is the foundation of this action, contains a condition in the following words: "If the assured shall have or shall hereafter make any other insurance upon the property hereby insured, without the consent of the company written hereon, in such case this policy shall be void." As a defense the defendant alleges that, in violation of this condition, the insured, Howe, did cause the property to be insured by a policy issued by the Phoenix Insurance Company, January 21, 1867. The policy sued on is dated January 19, 1867.

It appears from the evidence that Howe applied to the agent of defendant on the 18th day of December, 1867, for insurance, and it was arranged that the policy should be issued and sent to him on that day. Howe, not having received the policy from

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defendant's agent, nor heard from him in regard to the business, on the 21st of the same month applied to the agent of the Phoenix Insurance Company for a policy covering his property. The terms of the insurance were agreed upon, but the agent, having no blank policies, executed a receipt to Howe for the amount of the premium then paid him, specifying the property to be insured, which was the same covered by the policy issued by defendant, and stipulating that a policy would be issued as soon as a blank should be received. The agent of the Phoenix company was not informed by Howe of his application to defendant's agent for insurance, and it appears that Howe, at the time, did not expect to receive the policy of defendant, as it had not been sent to him according to the prior arrangement. On the 22d, the day subsequent to the transaction with the agent of the Phoenix company, the agent of defendant delivered to Howe the policy sued on, dated on the 18th, and received payment of the premium. Howe did not inform him of his transaction with the Phoenix company. The property covered by these policies was destroyed by fire on the 26th. Under these facts defendant insists that the transaction with the Phoenix Insurance Company is in violation of the conditions of the policy against other insurance quoted above, and that defendant's contract is avoided thereby.

The question here presented is of very great difficulty, and its solution, either upon principle or authority, is not entirely free from doubt. Two preliminary questions may be considered, the determination of which will aid in reaching the final conclusion upon this point.

1. Which was the prior insurance, that by the defendant or the Phoenix company? It quite satisfactorily appears to us that the policy issued by defendant must be considered as commencing on the 18th, the day of its date. It was, in fact, issued on that day and the premiums covered the time intervening between that date and the day of its delivery, the 22d. Defendant after having collected the premium and delivered the policy, bearing date on the 18th, cannot be heard to deny that the policy did not operate until its delivery. If the policy did not bind defendant until the 22d, then has defendant received premiums for the time intervening before that date and the 18th which it has not earned. But this it cannot be permitted to claim.

2. What was the effect of the receipt given by the agent of the

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Phoenix Ins. Co.? It must be conceded that if it bound the company at all, and its binding effect cannot be denied, it raised a contract of insurance in all respects like the contracts of the company as expressed in the policies commonly issued by them. The agent was not clothed with power to vary or change the policies of the company and it cannot be presumed that such a thing was contemplated by either the agent or the assured when the receipt was executed. The transaction then was a contract for insurance upon the usual terms and conditions as expressed in the policy which the agent was empowered to issue. It is shown by the evidence that the policies of the Phoenix company contained a condition similar to the condition of the policy sued on against prior or subsequent insurance, without consent of the company indorsed on the policy, and declaring the same shall avoid the contract. It appears that the agents were authorized to issue policies of this form and that they embodied the contracts of insurance as commonly entered into by the company. The contract therefore between the Phoenix company and Howe must be considered as containing a condition against other insurance as above stated.

We now have the case of two policies given at different dates covering the same property, each having a condition against other insurance, both prior and subsequent, and providing that a breach thereof shall avoid the respective instruments. The question for us to determine is which, if either, of these instruments is valid, and which is avoided by the operation of a breach of the condition.

It will be remembered that a breach of the condition does not absolutely render void and of no effect the policy; it simply renders it voidable — its binding force and effect being subject to be defeated at the option of the company issuing the instruments. If no objection be made by the company on account of the breach of the condition, the policy may be enforced as though no forfeiture had ever happened. The act of the company, whereby it is shown that the instrument is treated as avoided, must be shown in order to defeat recovery thereon. If no such act or objection on the part of the company be shown, the contract will be considered binding. It is not necessary here to state what will amount to an act avoiding the contract, or when it must be done, further than to observe that it must appear that the underwriter relied upon the breach of the condition to defeat the contract.

Of course the company issuing the subsequent policy could not

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rely upon the breach of the condition, in order to avoid the instrument, until knowledge thereof was acquired, and its acts treating the policy as avoided would be sufficient if shown to have been done after such knowledge. The same principles will apply to the prior policy. It was not absolutely void, on account of the subsequent insurance, but was voidable only. It was a binding instrument when executed, and would so continue until some act done by defendant intended to avoid it, on account of the breach of the condition against the subsequent insurance. But it could not be avoided on account of the Phoenix policy unless that instrument itself was valid. If it so happened that when the action was brought on defendant's policy, or even at the trial, it was made to appear that the Phoenix policy could not be enforced, was avoided on account of the breach of a condition therein, it is obvious that the existence of that instrument shown to be inoperative would not constitute a breach of the condition in defendant's policy against subsequent insurance. That condition is against actual insurance to be subsequently made. The Phoenix policy created no insurance, it was avoided by the act of the company, and therefore did not constitute a breach of defendant's policy. The general principle of law upon this point may be stated as follows: In order to avoid a policy on account of a subsequent insurance against an express condition therein, it must appear that such subsequent insurance is valid and that the policy upon which it is made is capable of being enforced. If it cannot be enforced it is no breach of the prior policy. This principle is substantially embodied in the fourteenth instruction given by the court to the jury. The instruction could have been more properly worded, but its import is quite clear, and to the effect that, if the Phoenix company treated its policy as avoided, after notice of the existence of defendant's policy, it constituted no such subsequent insurance as would invalidate the policy in suit.

Our conclusion upon this branch of the case is not without support of the authorities. The following cases may be cited as sustaining the principles above stated: *Jackson v. Massachusetts Mut. Ins. Co.*, 23 Pick. 418; *Clark v. New England Ins. Co.*, 6 Cush. 343; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Stacy v. Franklin Ins. Co.*, 2 Watts & Serg. 506; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Schenck v. Mercer County Mut. Ins. Co.*, 4 Zab. 447; *Jackson v. Farmers' Ins. Co.*, 5 Gray, 52.

The doctrine which we have above announced does not go to the

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full extent of some of the cases just cited. It is held in *Philbrook v. The New England Mutual Insurance Company, supra*, that the prior policy is valid, even though the subsequent policy is not avoided by the underwriter issuing it, but the loss thereon is paid. And in others of these cases the rule is not expressly based upon the fact that the subsequent policy was treated by the underwriter issuing it as avoided.

The doctrine which we recognize here is based upon the fact that the subsequent policy was treated and considered as avoided by the company issuing it as soon as it had notice of the prior insurance. In our view this is a most important consideration, for, if the underwriter in the second policy does not treat it as avoided, it cannot so be considered by the insured or the company issuing the prior policy. The condition against prior insurance in the subsequent policy is for the benefit of the insurer, who may, at his option, waive it or insist upon enforcing its terms. If he seeks to enforce the condition and treats the policy as a void contract, it is indeed difficult to see upon what grounds it may be regarded as valid, as an insurance that will defeat the prior policy. In this view our conclusion is not in conflict with *David v. The Hartford Insurance Company*, 13 Iowa, 69, and *Bigler v. The New York Central Insurance Company*, 20 Barb. 635, and same case, 22 N. Y. 402. In the first of these cases an action was brought upon a policy containing a condition against subsequent insurance. Other insurance, taken after the date of the policy, was relied upon to defeat recovery. The plaintiff claimed that the subsequent policies, on account of certain conditions therein which were violated, were void. It is held that these policies are not void, but, on account of the breach of their conditions, might have been avoided. As they were treated as valid contracts by both of the parties thereto, the losses occurring thereon having been paid by the companies executing the subsequent policies, the breaches of the conditions were regarded as waived, and the instruments held to be binding upon the respective underwriters. The argument supporting the conclusion reached by the court may not entirely accord with the reasoning we have above adopted, but the result reached, we believe, is not inconsistent with the views we have herein expressed. *Bigler v. The New York Central Insurance Company*, 20 Barb. 635, and 22 N. Y. 402, in its facts very nearly resembles *David v. The Hartford Insurance Company*, the underwriter taking the subse-

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quent risk having waived the forfeiture and paid the loss under the policy. There are arguments and positions taken in the opinions in this case that are not consistent with the views we have adopted. They reach further than the mere support of the conclusion arrived at upon the facts involved in the case, the court of appeals holding (two justices dissenting) that the first policy would be defeated, even though the second was utterly void. This point was not in the case. While we may not be inclined to dispute the conclusion arrived at upon the facts presented, which we think is not at all in conflict with our views, we cannot assent either to the reasoning adopted by the court or the conclusions reached upon facts not before it for adjudication.

Carpenter v. The Providence Washington Insurance Co., 16 Pet. 495, is cited in support of the rule that when there are two successive policies, both containing conditions of avoidance on account of other prior or subsequent insurance without notice, the first may be avoided on account of the second insurance. This case we have observed is often cited in support of this rule, and is so referred to in *David v. The Hartford Insurance Co.*, and *Bigler v. The New York Central Insurance Co.*, *supra*. If such a rule be found in the case, but it does not so appear to us, its annunciation was not called for by the facts before the court, and made the basis of the decision. The policy upon which suit was brought is considered in the opinion the second instrument, and the court holds that it was defective by a condition therein against prior insurance, which in fact existed when it was issued. See page 509. The conclusion arrived at, we think, is not in conflict with the course of argument adopted by us and the result reached in this case. The argument, however, adopted by the court, in reaching the conclusion, is hardly consistent either with our reasoning or its results. But inasmuch as the facts are dissimilar to those before us, and the point ruled not necessarily in conflict with our decision, the case cannot be regarded as an authority against the principles we herein recognize.

II. During the progress of the trial defendant offered to show that the property insured was covered by a chattel mortgage at the time the policy was issued. This evidence was offered to establish a forfeiture of a condition of the policy to the effect that, if the insured was not the "*sole and unconditional owner*" of the property, the policy should be void. The court excluded the evidence, holding it would not establish a breach of the condition. While under

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the statute (Rev., § 2217), the mortgagee holds the legal title to the personal property covered by a mortgage, the mortgagor is nevertheless considered the owner. Such is the current of the authorities as to mortgages at common law which, as to the title and ownership of the property conveyed, are not different from chattel mortgages under the statute above cited. See *White v. Rittenmeyer*, decided at the present term of this court. It is considered that the mortgage creates a lien, and that the title of the property is conveyed to the mortgagee for the purpose, and no other, of enabling him to enforce such lien. The ownership remains in the mortgagor. It is absolute and depends upon no condition, and may therefore be said to be unconditional. It is true, his ownership may be defeated upon the happening of certain conditions, but this cannot be said to make his ownership conditional. The property of the chattels is absolutely and unconditionally in the mortgagor. This view finds support in the following authorities: *Rollins v. Columbian Mutual Fire Insurance Co.*, 5 Foster (N. H.), 200; *Pollard v. Somerset Mutual Fire Insurance Co.*, 42 Mo. 221; *Rice v. Town*, 1 Gray, 426; *Shepherd v. Union Mutual Insurance Co.*, 38 N. H. 232; *Norcross v. Insurance Co.*, 17 Penn. St. 429; *Conover v. Mutual Insurance Co.*, 3 Denio, 254. See S. C., 1 Comst. 290.

In our opinion the evidence was properly excluded.

[The other questions discussed were of no general importance.]

MILLER, J., dissented.

Judgment affirmed.

HUNTER, appellant, v. THE BOARD OF SUPERVISORS.

(28 Iowa 372.)

Taxation — of notes in another State.

A resident of Iowa had deposited for safe-keeping in Illinois promissory notes that had never been brought by him into Iowa. *Held*, that they were subject to taxation in Iowa.

ACTION of mandamus to compel the board of supervisors to strike out an item of \$5,000, "moneys and credits" in appellant's assess-

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ment for the year 1871. The cause was submitted to the court, on an agreed statement of facts, as follows:

"1st. The property assessed as moneys and credits consisted of notes amounting to about \$7,000, which belonged to plaintiff and were placed in an envelope and put into a safe in Illinois merely for safe-keeping, no one having any control over them in Illinois.

"2d. The notes were never in Iowa, and were left in Illinois in good faith and not to avoid taxation.

"3d. Said notes were not taxed in Illinois. The notes are worth their face.

"4th. The board of supervisors refused to strike the same from the tax list.

"5th. From the above statement of facts, should the court think said notes not taxable in the State of Iowa, a decree is to be entered, ordering the treasurer to strike the same from the tax list, and either party may appeal."

The court found that the property was subject to taxation in this State, and rendered judgment against the plaintiff, from which he appeals.

Morledge & McPherrin, for appellant.

Moore & Morseman, for appellees.

MILLER, J. It is urged by appellant that promissory notes are personal property; that, to render such property subject to assessment for taxation, it must have been within the State on the first day of January next preceding the annual assessment, and that the notes in this case never having been in the State were, therefore, not subject to taxation.

The statute, in section 711 of the Revision, specifies certain classes of property that are required to be omitted from the assessments. (See, also, ch. 31, Laws of 1842; ch. 79, Laws of 1844.) The next section (712) provides that "all other property, real and personal, within the State, is subject to taxation in the manner directed;" and it further provides that "this section is intended to embrace," with other species of property mentioned, "*money, property or labor due from solvent debtors on contract, mortgages, and other like securities,*" etc.

Now, while it is true that promissory notes are pr

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agreed statement of facts of which the following is the substance, to wit: George O. Merrick was the owner of lot 286 in the city of Ottumwa, and commenced the erection of a brick building thereon. Afterward Merrick agreed with plaintiff to complete the third story of said building in pursuance of a specified plan, and to deed the same, together with the right of way thereto, to plaintiff, in consideration whereof the plaintiff agreed to pay the sum of \$1,700. The said third story was finished in accordance with the terms of the contract, and plaintiff took possession thereof, and still retains the same.

Merrick deeded the said third story to plaintiff in pursuance of this agreement, and afterward, by regular line of conveyance from Merrick, the defendant, Alvin Lewis, became seized of the lot and the remainder of the building. The building is three stories with a cellar. The roof is flat, rising two or three feet above the ceiling of the third story room at the front, and sloping back, having a fall of two or three feet, and is covered with tin. The roof does not rise above the walls of the building, and there is no garret or other room above the third story room. The roof became out of repair, and the rain coming through fell upon the ceiling of the rooms of plaintiff, and leaked upon the carpet and furniture therein, to plaintiff's damage. Plaintiff, in writing, informed defendant that the roof was out of repair, and requested him to repair the same, which defendant neglected and refused to do. After waiting a reasonable time, plaintiff repaired the roof at a cost of \$30, which sum was necessarily expended for that purpose.

The court rendered judgment for plaintiff for thirty dollars. Defendant appeals.

Hutchison & Hackworth, for appellant.

E. L. Burton, for appellee.

DAY, J. From the statement of facts it will be seen that plaintiff is the owner of the third story of the building, and defendant owns the two remaining stories and the ground upon which the erection stands. Although this mode of ownership is not at all unusual in large cities, yet the common law does not clearly define the relative rights and duties of persons so situated. 2 Washb. on Real Estate (2d ed.), marg. p. 79. Yet enough has been decided to render easy the determination of the question here involved.

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In *Tenant v. Goldwin*, 2 Ld. Raym. 1091, it is said that if one man have the upper part of a house and the other the lower, each may compel the other to repair his part in preservation of the others. In an anonymous case in 11 Modern, page 7, it is held, that if a man has an upper room, an action lies against him by one who has an under room, to compel him to repair his roof. And so where a man has a ground room those over him may have an action to compel him to keep up and maintain his foundation.

In *Cheesborough v. Green*, 10 Conn. 318, which was a case in which the plaintiff owned and occupied the foundation and first and second stories of a building, and the defendant owned the third story and roof of the same building, and suffered the roof to become leaky and ruinous, occasioning damage to the plaintiff's goods in the lower story, it was held that an action on the case would not lie, but that the plaintiff's remedy must be sought in chancery. In *Loring v. Bacon*, 4 Mass. 575, the defendant was seized in fee simple of a room on the lower floor of a dwelling-house and of the cellar under it, and the plaintiff was seized of a chamber over it, and of the remainder of the house. The roof became in such condition that unless repaired no part of the house could be comfortably occupied. The defendant refused to join in making the repairs. The plaintiff then made the necessary repairs, and brought an action in assumpsit for labor and materials employed and money expended. PARSONS, C. J., announcing the opinion of the court, said: "Although in the case the parties consider themselves as severally seized of different parts of one dwelling, yet in legal contemplation each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof and other parts of the edifice are the plaintiff's dwelling-house. And in this action it appears that having repaired his own house, he calls upon her to contribute to the expenses, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage, if he had not repaired. Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff." These are all the authorities we have been able to find bearing upon this subject. All of them except *Cheesborough v. Green* are adverse to the right of plaintiff to recover. The case of *Cheesborough v. Green*, 10 Conn. 318, does not sanction the right of the owner of the upper

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story to recover for repairs, but holds that the remedy of the owner of the lower story is in equity and not at law. If each party respectively is the owner of a distinct dwelling, as held in *Loring v. Bacon*, the solution of the question becomes easy; for no legal principles can readily be discovered upon which a party can recover of another for repairs made upon his own property.

And that, in legal contemplation, each party is the owner of a distinct dwelling cannot, in our opinion, be successfully refuted.

The court erred in finding for plaintiff the value of the repairs made, and its judgment is reversed.

STOUT v. FOLGER, appellant.

(21 Iowa, 71.)

Action — assumption of indebtedness. Measure of damages.

Defendant for a valuable consideration agreed to assume and to save the plaintiff harmless from certain outstanding debts against him. One of plaintiff's creditors afterward commenced an action against him on a debt included in the agreement. *Held*, that plaintiff could maintain an action against defendant on the agreement without alleging payment or discharge by him of the debt; and (2), that plaintiff could recover the full amount of the debt.

THE plaintiff alleged that on the 1st day of November, 1870, he and the defendant entered into a contract as follows, to wit: "I, E. S. Stout, do hereby sell to John M. Folger, all my right, etc., in the hotel known as the Des Moines House, for the consideration of \$1,000. In further consideration for said sale, he, the said John M. Folger, hereby agrees to assume in my place and stead and to save me harmless from all indebtedness contracted by me, and outstanding against said Des Moines House." Plaintiff further alleged that there was outstanding at said date, an indebtedness of said Des Moines House, to Patrick Gill & Co., of \$484.60, which defendant, in virtue of said agreement, promised to pay. That Patrick Gill & Co. had commenced an action against plaintiff to recover said amount, and had procured an attachment to issue therein and to be

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served upon property of plaintiff sufficient to satisfy the same, and that defendant had not paid said claim nor saved plaintiff harmless from the payment thereof.

Plaintiff asked judgment for \$484.60.

To this petition the defendant filed the following demurrer:

1. "The petition fails to allege payment or discharge by plaintiff of the claim of Patrick Gill & Co., sued on."

2. "The petition shows a present subsisting indebtedness from defendant to Patrick Gill & Co., for the claim sued on."

The demurrer was overruled. Defendant appeals.

Bancroft, Gatch & Hammond, for plaintiff.

McHenry & Bowen and *Louis Ruttkay*, for defendant.

DAY, J. I. It is claimed by defendant that his contract is merely to save plaintiff from harm by reason of his indebtedness, and that, until plaintiff has paid the debt, he is not damnified and cannot recover. We have examined the numerous authorities cited in defendant's brief, and while they are not altogether free from confusion, yet we think underlying them will be found the following doctrines: That if a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff. But if the covenant or promise be to perform some act for the plaintiff's benefit, as well as to indemnify and save him harmless from the consequences of non-performance, the neglect to perform the act is a breach of contract, and will give an immediate right of action. See *Lathrop v. Atwood*, 21 Conn. 117.

The authorities agree that upon an undertaking to pay a debt due a third person, the plaintiff may maintain an action without showing that he has paid the debt. *Lathrop v. Atwood*, *supra*; *In re Negus*, 7 Wend. 499; *Port v. Jackson*, 17 Johns. 239; *Thomas v. Allen*, 1 Hill, 145; *Churchill v. Hunt*, 3 Denio, 321; *Wilson v. Stillwell*, 9 Ohio St. 467; *Redfield v. Haight*, 27 Conn. 31. The petition alleges that at the time the agreement sued on was made, there was an outstanding indebtedness of the Des Moines House to Patrick Gill & Co., and that since the making of said agreement the plaintiff has been sued thereon, and his property has been attached. The defendant's agreement contains two distinct stipulations

First, he agrees to assume, in plaintiff's place and stead, all indebtedness contracted by plaintiff, and outstanding against the Des Moines House ; second, he agrees to save the plaintiff harmless from all such indebtedness.

It is a canon of interpretation that a contract is to be so construed, if possible, as to give effect to all its terms. The construction of defendant ignores a part of the agreement, and gives effect only to the undertaking to save harmless.

At the time the agreement was made an indebtedness contracted by the plaintiff was outstanding against the Des Moines House. This debt the plaintiff was under legal obligation to pay. This obligation defendant agreed to assume. He undertook to substitute himself in the "place and stead of plaintiff." Hence the obligation to pay resting upon plaintiff, defendant agreed to assume. We do not see wherein his contract differs from an absolute undertaking to pay this debt. Hence his contract falls within the principle of the cases above cited, and the plaintiff may maintain an action upon showing a failure to pay as agreed. It follows that the demurrer was properly overruled.

II. The question as to the amount of plaintiff's recovery has been incidentally argued, and as it may arise in the further progress of the case, we deem it proper to dispose of it here. Two cases cited by appellant (*Israel v. Reynolds*, 11 Ill. 218, and *Dye v. Mann*, 10 Mich. 291), hold that the plaintiff can recover nominal damages only. These cases make the statement simply without any reasoning or citation of authorities. We believe the position to be opposed to the weight of authority and reason.

In *Lathrop v. Atwood*, *supra*, this precise question was presented, and CHURCH, C. J., announcing the opinion of the court, said: "Notwithstanding all the defendants insist that, although they have violated their engagement, and have thus given to the plaintiff a right of action against them, they are liable only for nominal damages, because the plaintiff has neither paid any of these debts before suit, nor been subjected to actual loss or damage by reason of the defendants' neglect, and defendants, or Lathrop, one of them, remains still liable, and may be subjected at the suit of the creditors to the payment of the claims, and thus subjected twice. All this may be; but by whose fault? Not the plaintiff's. The very reason why the plaintiff required and the defendants agreed to pay these debts was to exonerate and relieve the plaintiff from any

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preparation or pains-taking for the payment of them. The defendants received and have put into their pockets the means of paying, and, holding on to these, they now say, we will neither pay to the plaintiff nor to the creditors. A judgment for nominal damages would give the sanction of the law to this unjustifiable claim. The cases we have referred to as sustaining this action, all, impliedly at least, oppose this claim of the defendants, and several of them very explicitly." Citing *Ex parte Negus*, 7 Wend. 499; *Crofoot v. Moore*, 4 Vt. 204; *Atkinson's Ex'rs v. Coolsworth*, 8 Mod. 33. The case of *Port v. Jackson*, *supra*, is to the same effect. See, also, *Ham v. Hill*, 29 Mo. 280. Following these authorities, our opinion is that the plaintiff may recover the amount agreed to be paid. [The court then decided a question of practice.]

Judgment affirmed.

SMOTHERS v. HANKS, appellant.

(84 Iowa, 286.)

Physicians, liability of. Negligence.

The law requires of physicians and surgeons, in the treatment of their patients, the use of ordinary skill and diligence only, the average of that possessed by the profession as a body, and not of the thoroughly educated only; having regard to the improvements and advanced state of the profession at the time of the treatment. (*See note, p. 146.*)

ACTION to recover damages of the defendant, a practicing physician, for alleged negligent, ignorant and unskillful treatment, by him, of the plaintiff's arm, the bones of which had been fractured near the wrist. The cause was tried to a jury, and the evidence introduced tended to show that plaintiff's arm had been broken; that defendant, who held himself out as a surgeon, undertook the cure; that, by reason of defendant's negligence or ignorance, a perfect cure was not effected; that the arm, hand and fingers were crooked and stiff—perhaps permanently so, perhaps not. The jury found a verdict for plaintiff for \$2,000, which, on a motion for a new trial, was reduced to \$1,200, and judgment was rendered

thereon, from which defendant appeals. The further facts are stated in the opinion.

Seavers & Cutts, for appellant.

Liston McMillen, for appellee.

COLL, J. [After deciding a question of practice.] It is next assigned that the court erred in giving the seventh instruction, which is as follows: "If the defendant undertook, in the capacity of a surgeon, to treat the fractured arm of the plaintiff, he thereby contracted to possess and employ, in the treatment of the case, such reasonable skill and diligence as are ordinarily exercised in the profession by thoroughly-educated surgeons, having regard to the improvements and advanced state of the profession at the time; and if he has failed in so doing, without any fault or neglect of the plaintiff, he is liable in damages therefor."

In our opinion this instruction does not give the true legal standard as to the skill and diligence required. The error consists in requiring the measure of skill and diligence ordinarily exercised by *thoroughly educated* surgeons; whereas, the true measure is that ordinarily exercised in the profession by the members thereof as a body. That is, the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole. Not that exercised by the *thoroughly educated*; nor yet that exercised by the *moderately educated*, nor merely of the *well educated*, but the *average* of the thorough, the well and the moderate — all, in education, skill, diligence, etc. We do not stop to discuss critically the meaning of the term, "thoroughly educated;" nor is it necessary to prove that it means "fully, completely and perfectly educated," or that it necessarily implies an entire and perfect knowledge. It is enough that it must mean that the standard of the skill and diligence was not the average of the whole body of the profession, or in other words, *ordinary skill*, but was that exercised by some defined or undefined portion of the profession, or in other words *more than mere ordinary skill*. Of course in determining this ordinary skill, "regard should be had to the improvements, and advanced state of the profession at the time" the case was treated, for such regard is necessary in order to correctly ascertain the true standard of ordinary skill. It is also doubtless true that the stand-

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ard of ordinary skill may vary even in the same State, according to the greater or lesser opportunities afforded by the locality, for observation and practice, from which alone the highest degree of skill can be acquired. As to this last thought, see Shearm. & Redf. on Neg., § 436, p. 491. And as to skill and diligence generally as above stated, see *id.*, §§ 431–443, and the cases cited in the notes. See, also, *Howard v. Grover*, 28 Me. 97; *Simonds v. Henry*, 39 *id.* 155; *Patten v. Wiggin*, 51 *id.* 595; *Landon v. Humphrey*, 9 Conn. 209; *Reynolds v. Graves*, 3 Wis. 416; *Gallagher v. Thompson*, Wright's Rep. (Ohio) 446; *Bowman v. Woods*, 1 G. Greene, 441.

We are not disposed in any degree, not even in the very least, to let down or lower the true standard of professional skill or diligence, either in medicine, law or other applied science. But we recognize the fact that this standard must be a practical and attainable one, and not one of mere theory or fancied perfection, the enforcement of which would cause much litigation, and necessarily drive from the profession a large portion of those from whose practice the largest measure of practical good is attained.

The case of *McCandless v. McWha*, 22 Penn. St. 261, is so often cited, and parts of the opinion by WOODWARD, J., so often quoted in text-books and cases, that we deem it proper to give it here a somewhat extended analysis. The case arose in Pittsburg, Penn., and was decided by the supreme court, 1853. The plaintiff had, in some way, suffered "*an oblique comminuted fracture of the tibia and fibula* of the leg, which fracture was nearly half way from the ankle to the knee." The defendant, a regular practicing physician and surgeon, was called to treat it. The plaintiff claimed that by the want of skill and attention by defendant, the leg had become shorter than the other. The defendant denied the want of skill, and alleged that the shortening came from the improper loosening by plaintiff of the bandages and extensions, and the previous intemperate habits of plaintiff. There was a jury trial in the court below, and the court instructed the jury "that the defendant was bound *to bring to his aid the skill necessary* for a surgeon to set the leg so as to make it straight, and of equal length with the other when healed, and if he did not, he was accountable in damages, just as a stone mason or bricklayer would be in building a wall of poor materials, and the wall fell down; or if they build a chimney, and it would smoke by reason of a want of skill in its construction, they could not only recover pay for building, but

would be accountable for damages; and, if suits were more frequently brought, we would perhaps have fewer practitioners of medicine and surgery not possessing the requisite professional skill and knowledge than we now have. But it is due to the defendant to state that, with the exception of the matter complained of in this suit, there is nothing in the evidence given to show that he is not respectable in his profession."

The opinion of a majority of the court was delivered by WOODWARD, J., and, in remarking upon the first instruction above, he says: "It is impossible to sustain this proposition. It is not true in the abstract, and if it were, it was inapplicable to the circumstances under investigation. The implied contract of a physician or surgeon is not to cure, to restore a fractured limb to its natural perfectness, but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length; or the patient may, by willful disregard of the surgeon's directions, impair the effect of the best conceived measures. He deals not with insensate matter like the stone-mason or bricklayer, who choose their materials and adjust them according to mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and a *will* to regulate and control. The evidence before us makes this strong distinction between surgery and masonry, and shows how the judge's inapt illustration was calculated to lead away the jury from the true point of the cause.

"The question was not whether the doctor had brought to the case skill enough to make the leg as straight and long as the other, but *whether he had employed such reasonable skill and diligence as are ordinarily exercised in his profession*. For less than this he is responsible in damages; but if he be held to the measure laid down by the court below, the implied contract amounts on his part to a warranty of cure, for which there is no authority in law. * * * The only remaining error assigned (upon the other instruction) is scarcely worthy of notice. The action depended so entirely on its own circumstances, that the observation of the court as to the policy of such suits was irrelevant, and we may fairly presume harmless. But, for misdirection on the other point, the judgment is reversed, and a *venire de novo* awarded."

The precise point decided by the case is, that physicians are not accountable in damages for a failure to make a perfect cure, just as

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a stone-mason or bricklayer is liable for a failure to make a perfect job. What is above quoted from the opinion is substantially all that legitimately pertains to it. But the learned judge says very much more, and some of it is not entirely consistent with that we have quoted, while some of it is. To illustrate we quote further: "We have stated the rule to be reasonable skill and diligence; by which we mean such as thoroughly educated surgeons ordinarily employ. If more than this is expected, it must be expressly stipulated for; but this much every patient has a right to demand in virtue of the implied contract which results from intrusting his case to a person holding himself out to the world as qualified to practice this important profession." But afterward, he uses this language: "The law has no allowance for *quackery*. It demands *qualification* in the profession practiced—not extraordinary skill, such as belongs only to a few men of rare genius and endowments, but *that degree which ordinarily characterizes the profession*. And in judging of this degree of skill, in a given case, regard is to be had to the advanced state of the profession at the time." In our opinion, in this last quoted paragraph, the learned judge re-announced the correct rule of law, the same as he had in the body of the opinion as set out above. But in the preceding quotation, he announced a very different rule, to wit: "Such reasonable skill and diligence as *thoroughly educated* surgeons ordinarily employ."

The whole case of *McCandless v. McWha* is a remarkable one. None of the evidence taken upon the trial in the court below was before the supreme court, except the deposition of one of the witnesses on the part of the defense, and yet, LEWIS, J., without dissenting from the opinion of WOODWARD, J., filed an extended opinion in which he discusses the merits of the case upon the evidence in the light of a large number of medical treatises, from which he quotes and upon which he comments. But he sums up his discussion with the statement that the main question is, "Did the surgeon *exercise ordinary skill and care in his treatment of the patient*? If he did, he is not liable. If he did not, he is." While BLACK, Ch. J., delivered the following opinion: "We all concur in the law of this case. The judge in his charge fell into an error in stating the amount of skill required in the treatment of the case. We reverse for that reason. But when we decide the legal point we are done with it. We are not authority on questions of surgery. Our hands are abundantly full with questions that belong to our

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profession, without volunteering opinions on sciences which relate to others. I think it necessary to say this in order to prevent the court below, on a second trial, from supposing that we intend to give them any instructions on matters in which we have no jurisdiction."

The fact that we now have before us two cases in which the courts below have been led into error by quotations from Judge Woodward's opinion, found in the notes in different text-books, has led us to give the case this extended notice. The point decided and the law actually ruled in the case were right beyond question. But very much of the opinions of Woodward and Lewis, JJ., are outside of the case, and their observations are well calculated to mislead. It may not be out of place to remark, that a majority of this court concur with Chief Justice Black in his observation that "our hands are abundantly full with questions that belong to our own profession without volunteering opinions on sciences which relate to others." For the error in the instruction as before noticed the judgment is

Reversed.

BECK, J., dissented.

NOTE. — In *London v. Humphrey*, 9 Conn. 203, it is said that "a physician and surgeon in the performance of his professional duties is liable for injuries resulting from the want of ordinary diligence, care and skill," and to the same effect is *Gallaher v. Thompson*, Wright, 463, and *Howard v. Grover*, 23 Me. 97. In *Wood v. Clapp*, 4 Sneed, 65, the court said that a physician "impliedly contracts with those who employ him that he has such skill, science and information as will enable him properly and judiciously to perform the duties of his calling;" but the court continued, "the law does not, however, require the *highest degree* of skill and science, but only such reasonable degree as will enable the person safely and discreetly to discharge the duties assumed." And this doctrine is substantially affirmed in *Long v. Morrison*, 14 Ind. 595; and in *Reynolds v. Graves*, 3 Wls. 416. In *Richey v. West*, 23 Ill. 285, the court expressed the rule as follows: "The principle is plain and of uniform application, that when a person assumes the profession of physician and surgeon, he must, in its exercise, be held to employ a reasonable amount of care and skill. For any thing short of that degree of skill in his practice, the law will hold him responsible for any injury which may result from its absence." To the same effect are *Simonds v. Henry*, 39 Me. 155; *Patten v. Wiggin*, 51 id. 595. — REP.

Almond v. Nugent.

ALMOND v. NUGENT, appellant.

(84 Iowa, 800.)

Physicians — liability of.

The civil responsibility of physicians and surgeons in the treatment of their patients is not governed by the same rules of law that apply to mechanics and artisans in the execution of their work. *Smothers v. Hanks, ante*, p. 141, followed.

THIS action was brought against W. R. Nugent and M. D. Sherrick, who were partners in the practice of medicine and surgery. The plaintiff claimed to recover for alleged want of skill, care and diligence on the part of defendants, who were called by him to treat a compound oblique fracture of both bones of his right leg, between the ankle and knee. The defendant Sherrick died, and the action was tried to a jury as against Nugent alone. There was a verdict and judgment for plaintiff for \$2,000. The defendant appeals.

Stuart Brothers and C. E. Millard, for appellant.

Phillips & Phillips, for appellee.

COLE, J. The court gave to the jury the following instructions, asked by the plaintiff, to wit: "1. That the general principles of law defining the civil responsibilities of physicians and surgeons are the same as those that apply to and govern the conduct of lawyers, engineers, mechanics, ship-builders, brokers and other classes of men whose employment requires them to transact business requiring special skill and knowledge.

"2. The implied contract of the physician and surgeon is, that he possesses and will employ, in the treatment of the case, such reasonable skill and diligence as are ordinarily exercised in his profession by thoroughly educated physicians and surgeons; and in judging of the degree of skill required, regard is to be had to the advanced state of the profession at the time of treatment.

"3. The standard of ordinary skill in the profession is on the advance, and he who would not be found wanting must apply him-

self with diligence to the most accredited sources of knowledge. He is bound to be up to the improvements of the day, for the patient is entitled to the benefit of these increased lights. The law has no allowance for quackery. It demands qualifications in the profession. He is bound to exercise his art or profession rightly and truly as he ought; for less than this he will be liable in damages to the injured party." Each of these instructions was duly excepted to, and the giving of them is now assigned as error.

In the case of *Smother v. Hanks*, ante, p. 141, we had occasion to determine the correct legal standard of the skill, care and diligence required of physicians, surgeons, etc. That standard is the reasonable skill, care and diligence ordinarily exercised by the members of the profession at the time of the treatment in question, having regard to the advanced state of the profession at the time. The idea is, that degree of skill and diligence which ordinarily characterizes the profession as a whole, or generally; and not that of any particular class or portion of the profession. In that case also we reviewed the case of *McCandless v. McWha*, 22 Penn. St. 261, upon Judge WOODWARD's opinion, from which much of the language of each of the foregoing instructions was taken. We found that it was directly decided in that case that the general principles of law defining the civil responsibilities of physicians were not the same as apply to engineers, mechanics and ship-builders. And we also found that it was not there *decided* that the skill and diligence required of physicians and surgeons was that ordinarily exercised by thoroughly educated members of that profession; and it may be further remarked that the closing sentence of the third instruction was also taken from the same opinion, and repeats the error of that learned judge who applies the pithy saying of Fitzherbert, that "it is the duty of every artificer to exercise his art rightly and truly as he ought," to *professional* men as well as *artificers*, the very error into which the *nisi prius* court had fallen, and for which its judgment was, by the same opinion, reversed. There was error, therefore, in each of the instructions above set out.

On the trial the court admitted evidence of the declarations of the partner Sherrick, who was then deceased. It is unnecessary to review the several questions and answers *seriatim*. Only those declarations were competent which were made by the partner while engaged in, or which were connected with, the business of the partnership. Upon the subject of exemplary damages, we need only

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remark, that we see nothing in the case, as now presented, justifying such damages, or showing that the jury allowed such.

Judgment reversed.

HENDERSON, appellant, v. GREEN.

(81 Iowa, 487.)

Will — devise — specific devise.

A testator, after devising all his real estate to his widow for life, devised a specific parcel thereof to B and the "balance" thereof to C. *Held*, that the devise to C was specific and not residuary, and that C was entitled to contribution from the other devisee for a portion of the land devised to him taken to pay debts of the testator and the dower of the widow, who elected not to take under the will.

THIS action is brought by one legatee, to compel contribution by another, for the real estate devised to the former, which had been taken for dower and debts. The will, under which both parties claim, was made on the 27th day of April, 1869, the testator then being on a bed of sickness and expecting death, which occurred four days thereafter, and is as follows:

I, James B. Kitter of the township of Whitewater, in the county of Dubuque and State of Iowa, do make and publish this, my last will and testament, in manner and form following, that is to say:

First. It is my will that my funeral shall be conducted without pomp, unnecessary parade or ostentation, and that the expenses thereof, together with all my just debts, be fully paid.

Second. I give, devise and bequeath to my beloved wife, Margaret Kitter, in lieu of her dower, if she should so elect, the plantation on which we now reside, situate in the township aforesaid, and also the township of Prairie Creek, in the said county, during her natural life; and all the live stock, horses, cattle, sheep, swine, etc., by me now owned and kept thereon, also all the household furniture and farming utensils by me owned and kept thereon, forever. She shall, however, dispose of sufficient thereof to pay my just debts.

Third I give and devise to Eureka Green the north-east quarter of the north-east quarter of section thirty-six, range one west, township eighty-seven.

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Fourth. I give and devise to my niece, Emily Susannah Boohar, the balance of my real estate on the following conditions: That she pay W. B. O'Neil, John O'Neil, Mary O'Neil and Elizabeth O'Neil, each \$100.

Fifth. At the death of my said niece, Emily Susannah Boohar, I give and devise the said real estate to her son, James Boohar, forever.

The whole land devised was two hundred acres. The widow elected to reject the provisions of the will and to take her dower under the statute. Eighty acres out of the one hundred and sixty, devised in the fourth item to Emily S. Boohar, were assigned the widow for her dower; and forty acres of the remaining eighty, devised to Emily, were sold to pay debts. Emily S. Boohar died before this action was brought. The plaintiff stated these facts in his petition; and the defendant demurred because the petition did not state facts sufficient to constitute a cause of action, and stated facts which avoid the cause of action. This demurrer was sustained. The plaintiff appeals.

Shiras, Van Duzee & Henderson, for appellant.

D. E. Lyon, for appellee.

COLE, J. This case turns upon the single question whether the devise to Eureka Green, and over, to James Boohar, is a residuary devise. If it is, then the plaintiff is not entitled to contribution, and the demurrer was properly sustained; but if it is not a residuary devise then the plaintiff has stated a case in his petition, and the court erred in sustaining the demurrer.

That a court should, for the purposes of construction, place itself, as far as practicable, amid the surroundings of the testator, and should so construe the will as to effectuate his intent is not questioned. There is no controversy between counsel as to the question upon which the case turns, nor as to the rules of interpretation; hence we need not further state or discuss them.

The second item of the will embraces, under the phrase of "the plantation on which we now reside, situated in the township aforesaid, and also the township of Prairie Creek," all the real property owned by the testator at the time, and contained two hundred acres, in *seven* governmental subdivisions, and which could not be

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specified by government surveys, in less than *six* separate or distinct descriptions. The specific devise to Eureka Green, being item *third*, is *forty acres*, contained in *one* of these descriptions. The next item in the will, and the one upon which the controversy arises, devises "the balance of my real estate" to the plaintiff. If the testator, in this item, had specified, in his will, the six remaining governmental subdivisions by their separate descriptions, instead of using the words "the balance of my real estate," it would have been conceded at once a specific devise. Is it any less a specific devise because the testator has used a single general description, instead of the six separate descriptions? We think not. The general description was more easy and quite as natural and consistent with the intent to specifically devise it, as if the more extended and particular description had been employed.

In a recent and excellent work on wills, it is said that "it seems to be universally conceded that a devise of real estate is always to be regarded as specific, whether the estate is specifically described, or only in general terms, and by reference to other facts and documents." 2 Redf. on Wills (2d ed.) 144, par. 21; citing 1 Rop. 194; *Forrester v. Leigh*, Amb. 171, and other cases. The same author says, also: "The most obvious, and the chief reason, why descended estates have been held liable before devised estates, is, that every devise of real estate is regarded as specific, and this will be so regarded, as we have seen, although the devise be contained in a general clause in the will, or even where it comes under the general words 'all the residue of my estate, real and personal.'" 3 Redf. on Wills (2d ed.), p. 367, par. 20; *sed vide*, as to modifications of this, *id.*, note 36, and authorities cited. And in *Walker v. Parker*, 13 Peters, 166, it was *held*, that a devise of "the balance of my real estate, believed to consist of lots, number six," etc., was a specific devise. And further, it was *held*, in *Gibbins v. Eyden*, L. R., 7 Eq. 371; S. C., 17 W. R. 481, that where two estates were subject to a mortgage, and one was specifically devised, and the other passed by the residuary clause, that both estates were equally and ratably holden for the mortgage. In this case it is manifest from the terms of the will, that the testator intended Eureka Green should take the forty acres devised to her, burdened with the dower right of his widow, or, that which he had devised to his wife in lieu of her dower, to wit, her life estate in the whole. And it is eminently just and equitable that her forty acres should contribute to the fund

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requisite to discharge it from the burden, or its alternate, to which it was expressly subjected by the will under which it is claimed.

Judgment reversed.

RAINBOLT, appellant, v. EDDY.

(31 Iowa, 442.)

Promissory note—alteration of.

The alteration of a promissory note after delivery by filling a blank left therein, so as to make the note draw interest at ten per cent, will not invalidate it in the hands of a *bona fide* indorsee for value before maturity (See note, p. 153.)

ACTION upon a promissory note for \$218, made by defendant October 11, 1869, payable twelve months after date, with ten per cent interest, to the order of E. S. Howe, and indorsed by the payee in blank. Defense, that the note had been altered in a material part by writing the words "ten pr ct inst," in a blank in said note, after the same was executed and delivered, so as to increase defendant's liability, and of which plaintiff had knowledge before he purchased the note. Trial to the court, and judgment for the defendant. The plaintiff appeals.

N. A. Rainbolt, pro se, and J. S. Frasier, for appellant.

D. W. Gage, for appellee.

COLB, J. There is no question made as to the fact that the note sued upon was altered by the payee after delivery, and without the maker's consent, by inserting the words "ten pr ct inst," thereby increasing the maker's liability. It is also conceded that the alteration was made by inserting the words in a blank left in the note when executed, and was done in such a manner as not to afford suspicion of any alteration or the means of detecting it.

The plaintiff acquired the note before maturity; he testified positively that when he bought it he supposed it was all right. The defendant testified to facts tending to show that plaintiff

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had knowledge of the alteration; but does not fix the date these facts transpired, so as to render it all certain that it was before the plaintiff bought the note. Since the defendant by executing a note, and delivering it with a blank in it for the insertion of the interest, and thereby placed it in the power of the payee to do the wrong, as between him and the plaintiff, a *bona fide* purchaser for value, he ought to suffer any loss resulting therefrom; especially as he fails to show directly any notice to plaintiff of the alteration. *Lickbarrow v. Mason*, 2 Term R. 70; *McCramer v. Thompson*, 21 Iowa, 244 (*i. e.*, 249); *McDonald v. Muscatine National Bank*, 27 *id.* 319. See, also, *Hall v. McHenry*, 19 *id.* 521, and *Murray v. Graham*, 29 *id.* 520. The judgment will, therefore, be reversed, and the cause remanded for trial *de novo*.

Judgment reversed.

NORM. — As to the alteration of promissory notes, see *Holmes v. Trumper*, 7 Am. Rep. 681, and the note thereto. In *Wallace v. Jewell*, 8 *id.* 48, adding the name of a person as maker was held to be a material alteration. In *Fuhrer v. Setts*, *id.* 172, adding to a note with the consent of the maker, "interest payable semi-annually," was held to avoid it as to the sureties, and that at the trial the payee could not strike out the added words and recover on the note in its original form.

Washington Savings Bank v. Ekey, 51 Mo. 272, is in direct conflict with the above principal case. There, after the execution and delivery of the note, it was altered by filling up blanks left therein so as to make it bear interest at ten per cent. The court held that this avoided the note in the hands of an innocent indorsee, although the alteration was not perceptible. In *Ivory v. Michael*, 83 Mo. 898, a note was altered by filling a blank with the words "thirty days," so as to make the note read "thirty days after date I promise to pay," and by adding at the end of the note the words "bearing ten per cent after maturity." The court held that the first alteration would not avoid the note in the hands of an innocent holder, but that the second alteration would. The same principle was affirmed in *Freeburg v. Michael*, 83 Mo. 542.

In *Gillaspie v. Kelley*, 41 Ind. 156, there was a blank left in a promissory note between the words "payable at" and "bank," and the payee after delivery filled the blank with the name of a certain bank. The court held that this alteration did not vitiate the note, but stress was laid on the fact that in Indiana only notes payable at bank are negotiable instruments, and that it was the intention of the parties to make a negotiable instrument.

In *Fisher v. Webster*, 8 Cal. 100, the insertion in a blank of the rate of interest was held not to vitiate the note. — **RMP.**

MILLER v. HAYES, appellant.

(24 Iowa, 493.)

Marriage — breach of promise — evidence.

In an action for damages for breach of promise to marry, evidence that, since the commencement of the action, the plaintiff has made declarations to the effect that she had no affection for defendant, and would not think of marrying him but for his property, is not admissible on the part of the defendant in mitigation of damages.

ACTION to recover damages for the breach of an alleged promise to marry. The defendant, for answer, first denied the promise; and second, averred that, since the promise, the plaintiff had conducted herself in a dissolute manner, and had been guilty of adultery. Trial to a jury; verdict of judgment for plaintiff for \$5,400. The defendant appeals.

James Burt and L. H. Cady, for appellant.

COLE, J. There is but a single exception to the rulings and decisions of the court in the entire record, and the counsel for the appellant make but one point in their argument; that arises as follows: The defendant took the deposition of one Ellen McMahon, and, among others, propounded to her: "Int. 4. Did you ever have any conversation with the plaintiff about marrying the defendant, and, if so, state when and what the conversation was? Ans. She, the plaintiff, came into my house once, and I was scolding her about having any thing to do with Mr. Hayes (the defendant), as he was such an odd man, no body could get along with him. She said she thought she could humor him; she said she would not marry him any more than if he were a dog, if it was not for his property. She said she was forbid to say she would not marry him, as her lawyers said she must say she would marry him. This conversation was held after the suit was commenced; I don't know what time it was." This answer was objected to, on the ground that it was irrelevant and immaterial. The court sustained the objection. The defendant excepted, and now assigns such ruling as error.

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It will be noted that the conversation, detailed by the rejected testimony, took place "*after the suit was commenced.*" And it will also be observed that the statement of the plaintiff, as detailed by the witness, is, that "she would not marry him any more than if he were a dog, if it was not for his property;" that is, she declares her *then present* feelings, that she would not marry him in view of what had occurred. She does not say that she would not, at any time, have married him but for his property. Now, Mr. Parsons says that an offer to renew or execute the contract after a refusal should be no defense; *nor a change of feeling*, nor the fact that another had supplanted the plaintiff in the affections of the defendant." 2 Para. on Cont. (5th ed.) 68. And, it is said by Mr. Sedgwick, that "no evidence can be given of any fact having a tendency to aggravate the damages which has occurred after the commencement of the suit. Sedg. on Meas. Dam. (5th ed.) 423. If no evidence of any fact occurring after the suit commenced can be given to aggravate damages, it seems very reasonable, and entirely reciprocal, that no such evidence ought to be received to mitigate the damages. This seems to be "according to the strict rules of evidence," as was said by SUTHERLAND, J., in delivering the opinion of the court in the case of *Stiles v. Tilford*, 10 Wend. 339. And this rule was declared and applied by the supreme court of New Hampshire, in an action for a breach of promise, where an indecent and insulting letter, written by the defendant to the plaintiff after the suit was commenced, was held incompetent. *Greenleaf v. McColley*, 14 N. H. 304.

Although the court instructed the jury that in fixing the amount of damages they should take into consideration the injured feelings, affections and wounded pride as well as loss of marriage, yet this rejected testimony was not competent in mitigation of damages as tending to show that there was no affection, since the declaration offered related to the plaintiff's feelings at the time it was made. This evidence showing a change of feeling is, as Mr. Parsons says, no defense. The plaintiff may well have thought, in view of the defendant's failure to keep his promise, and all that had occurred, that there was nothing desirable remaining to defendant except his property.

Judgment affirmed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE

TRUE V. INTERNATIONAL TELEGRAPH COMPANY.

(60 Me. 2.)

Telegraph company — liability for failure to deliver message — conditions against liability — measure of damages.

Plaintiff having received an offer of a cargo of corn at 90 cents a bushel, delivered to defendant—a telegraph company—for transmission, a message in reply to the offer, written on a “night-message blank,” in these words: “Ship cargo named at 90, if you can secure freight at ten—wire us the result,” and paid 48 cents—the rate for night messages, and which was less than the day rates. The blank contained the following printed condition: “It is agreed between the sender of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message, beyond the amount received by said company for sending the same.” The message was sent, but was not delivered; by reason whereof, the plaintiff failed to obtain the corn at the terms offered, and the price of corn and freight having advanced, plaintiff was compelled to purchase at higher terms. *Held*, (1) that the condition in the blank was not reasonable, and did not exonerate the company from liability beyond the sum paid for sending the message; (2) that, assuming that the corn would have been forwarded at the terms named but for the non-delivery of the message, the measure of damages was the difference between the price stated, and that which the plaintiff would have been obliged to pay at the same place, in order by due diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of corn, together with the additional freight. APPLETON, C. J., dissenting. (*See note, p. 168.*)

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ACTION to recover damages for the non-delivery by the defendant, a telegraph company, of a message written on a "night-message blank" by the plaintiff, and given to defendants for transmission. The message was in answer to one received by the plaintiff offering a cargo of corn at a specified price, and accepting the offer. The rates for transmitting night messages were about half those charged for day messages. By reason of the non-delivery of the message, the plaintiff failed to obtain the corn, and the price of corn and of freight having immediately advanced, the plaintiff was obliged to buy other corn at higher prices. The superior court stated the facts for the opinion of this court; and if the plaintiff was entitled to recover more than the sum paid for transmitting the message, the full court was to determine the rule of damage and remand the case for assessment of damages upon a further hearing.

The remaining facts are stated in the opinion.

Symond & Libby, for plaintiff.

Davis & Drummond, for defendant.

KENT, J. On the 12th of January, 1870, the plaintiffs received a telegram from a firm in Baltimore, offering to sell them a cargo of corn at ninety cents per bushel. Whereupon one of the plaintiffs went to the office of the defendants and asked for one of the "night-message blanks," and wrote thereon the following telegram, addressed to the said firm, and paid forty-eight cents, the sum demanded: "To Radcliff & Patterson, Baltimore;—Ship cargo named at ninety; if you can secure freight at ten, wire us result, Geo. W. True & Co."

It is admitted that the telegram was never delivered to Radcliff & Patterson. It is also admitted that the message was sent the same night to Boston, which is the western terminus of defendant's line, and was thence forwarded by the Franklin Telegraph Company, with which the defendants have a business connection, making them reponsible for the whole distance; the lines of the Franklin company extending through Baltimore to Washington. No reason is assigned for the non-delivery of the message.

1. The defendants admit their liability for the mistake or delay in the transmission, and for the non-delivery of the telegram. This is an important fact, and relieves the case of any difficulty in determining this primary and fundamental point of actual liability.

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2. The defendants claim that this liability is limited to the repayment of the forty-eight cents. The plaintiffs claim damages for losses sustained by them, beyond this small sum, by reason of the non-delivery of the message.

3. This claim of exemption, on the part of the telegraph company, is based upon a special condition contained in the paper, on which the message, signed by the plaintiff, was written.

That paper, called a "night-message blank," contained, above the written message, several printed specifications of the terms and conditions on which these night messages would be received and forwarded. The last one was in these words:

"And it is agreed between the senders of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message, beyond the amount received by said company for sending the same."

Then follows, next above the written message, the words, "Send the following message, subject to the above terms, which are agreed to."

There can be no doubt, that the above conditions, with the assent signified by the signature of the plaintiffs, covers this and all other cases of mistake and non-delivery. The question is whether the contract can legally be thus limited, and the defendants be thereby exonerated for all liability, to the extent claimed.

There has been much discussion in various cases, as to the nature of this comparatively new contract for the transmission of messages, by means of electricity; and the liabilities, limitations and qualifications of this undertaking. It has been likened to the case of a common carrier, and it is contended by many, that all the strictness of the common law, applicable to carriers, is to be applied to telegraph companies. On the other hand, it is contended, that they are but simple bailees for hire, to do a certain specified thing, — "*locatio operis faciendi*." It is clear that telegraph corporations or companies exercise a public employment, or as said by C. J. BIGELOW, 13 Allen, 226 (*Ellis v. A. Telegraph Co.*), a *quasi* public employment; certainly as much so as express companies or stage-coaches or railroads. They often invoke the exercise of the right of eminent domain. They everywhere announce a readiness to transmit messages for all applicants, at fixed rates. The nature of their undertaking is analogous to that of carriers. One assumes

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to transmit a letter, the other a larger, sealed package, to a given destination. Both are bound by certain rules of law, and held to a faithful and exact performance of a specified duty. So far as public policy is concerned, there seems to be but little reason for not holding both to the same rules. It might be interesting to follow out these analogies, and to enter upon the discussion of various questions, touching the extent of the common law and statute liabilities of these companies, and the extent of the right and power of these companies to limit their liabilities by notice or conditions, apparently assented to by the other party.

But the case before us does not require this extended examination. It presents to us the single question, whether this condition is one which the company could rightfully impose upon its undertaking.

We are satisfied that telegraph companies, like all other corporations and individuals, may prescribe, adopt and enforce reasonable rules and regulations for the convenient and prompt and satisfactory performance of their duties and obligations, not inconsistent with that performance. We think they may go further and establish stipulations and regulations, to some extent restraining and limiting their common-law liabilities, made known to and directly or indirectly assented to by those employing them.

We are equally well satisfied that there is a limit to this power of avoidance of legal liabilities. It does not rest with such companies to fix these conditions absolutely, by which they may avoid duties and responsibilities, by their mere will, or by their views of self-interest, or desire to shield the company or its officers from the direct consequences of neglect or carelessness.

The public and those who employ these agencies to perform important services, have rights, which cannot be ignored or avoided by stipulations made by interested parties. When a company assumes the position of offering its services generally, to all who may apply, under its character of a public corporation, it does not stand exactly in the same position as private individuals contracting in a single matter, on terms and conditions mutually agreed upon for that particular case.

The discussions in the text-books and in the decided cases have led to the conclusion, that while, in the first instance, the company may make its rules for the regulation of its business, and for the limitation of its liability, those rules must be reasonable, in view of all the circumstances, and of the nature of the business, its risks

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and responsibilities, the necessity of securing to the public, who may have occasion to use this means of transmission, a reasonable protection against neglect or fraud or want of due care and effort, to perform punctually and correctly the act undertaken.

The company is not the ultimate judge of the reasonableness of an adopted rule. And in this single proposition lies the gist of the whole matter. The court must determine in every case when the question is directly raised, whether the particular restriction or qualification is a reasonable exercise of the powers residing in the company.

Several questions as to reasonableness have arisen under different conditions made by telegraph companies, and have been considered by the courts. One of them has arisen under a condition, which is found in the general blank of the defendant company, by which it is stipulated that the company will not be responsible for more than the sum received for mistakes or delays, or for non-delivery of any message, unless requested to repeat it on payment therefor, nor for more than fifty times the sum received for any repeated message, unless paid for insuring it.

It seems to be held, that however it may be in cases where the error causing the injury was occasioned by not repeating, or would have been manifestly prevented or avoided by repeating, yet this condition could not cover and excuse negligence or delay in delivering a message received, or any other nonfeasance or misfeasance not imputable to or excused by not repeating. *Western Union Telegraph Company v. Graham*, 1 Colorado, 230; 9 Am. Rep. 136; *Burney v. N. York & Washington Telegraph Company*, 18 Md. 341.

In the case at bar no such question arises. No such condition is found in the "night message blanks" of the company. These messages are of a special class, and are made subject to their own rules, as printed on the blanks. The charge for transmission of these night messages is considerably less than on those in the general business of the company, and, perhaps for this reason chiefly, the whole provision relating to repeating is omitted, and the sweeping and comprehensive provision by which in effect all liability beyond the price paid is avoided is substituted. It is clear that a mere change of rates or prices cannot avoid legal liability. The duty and responsibility of the company cannot properly be measured by the price for the duty undertaken.

The single question on this part of the case is whether the stipu-

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lation, recited in full at the commencement of this opinion, is a reasonable one, or one which the company could lawfully impose as a condition of the contract.

After a careful reading, it seems difficult to give any other construction to this clause than a general and unlimited exemption from all and any liability beyond the sum paid. It is not limited to those cases where reasonable care and attention might not prevent mistakes or delays. It makes no reference to the subtle and mysterious agency employed in the transmission of messages, or to the peculiar liability to error in the work of the operator. As before stated, this provision, in relation to night messages, does not require the repeating of telegrams sent, before a liability should attach. It simply and nakedly exonerates the company from all liability (except for the fee paid) for any and all mistakes in the transmission of the message — and for all delays in transmitting — and all delays in delivery, or even non-delivery, of the telegrams. These items seem to include all the cases of neglect, want of care or attention, of which the company can be guilty, in reference to the performance of their duties and obligations under the contract. Even gross negligence and the want of the lowest degree of care are protected from complaint, although affirmatively proved by the other party. The operator may, from sleepiness or haste to close for the night, prefer to pay back the trifle paid, and leave the message unsent. Or a message may have been carelessly, or even wantonly, thrown into the waste basket, and never sent, or if sent it may have been treated in the same manner at the office of reception, and never delivered to a carrier, or if so delivered, it may have been thrown aside or destroyed by the carrier to save himself labor or trouble. And the sender, under this rule, must be debarred from all remedy beyond a repayment of the few cents paid. This is not the establishment of a rule or rules for the management of the business which are reasonable and proper for the orderly conducting of its business, or to protect the company against unfair or unreasonable claims. In this case no attempt is made to excuse the non-delivery; but a liability is admitted.

We think this stipulation is not reasonable, for it does not come within any established principle, applicable to employments of this nature, whether called public or private. It goes altogether too far in attempting to cover all possible delinquencies. "A party cannot in such a way protect himself against the consequences of his own

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fraud or gross negligence, or the fraud or gross negligence of his servants and agents." *Ellis v. The American Tel. Co.*, 13 Allen, 234. In the case of *Birney v. New York & Wash. Tel. Co.*, 18 Md. 341, the court says that courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power; one, indeed, that would leave the public almost remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They do not select the agents or employees, nor can they remove them. They are bound to take the company as they find it, and to commit to its agents their messages, however valuable they may be. Such being the case, public policy, as well as commercial necessity, require that companies engaged in telegraphing should be held to a high degree of responsibility.

We restate our propositions and conclusions on this part of the case in order to prevent any misapprehension of the extent and limitations of the rules laid down.

1. This company, and all others of a like nature, offering and undertaking to perform acts or services for all applicants, at fixed rates, exercise, at least, a *quasi* public employment.

2. Such company may adopt and enforce reasonable rules and regulations for the convenient and prompt and satisfactory performance of the act or duty undertaken.

3. This right in the company is not absolute and unlimited; but such rules are subject to the test of reasonableness in view of the rightful claims of public policy and private rights, and the enforcement of the obligation of good faith and honest effort to perform.

4. The test must be applied by the court, whenever the question arises on the validity of any such regulation, according to the rule before stated.

5. A rule, or stipulation, like the one in question which covers all possible delinquencies, mistakes, delays, or neglects in transmitting or in delivering or not delivering a message, from whatever cause arising, is not, for the reasons before stated, a reasonable regulation within the legal rule.

6. Such a rule is not saved from these objections, by the condition of a liability to repay, if required by the sender, of the trifle paid to

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them. It is a mere evasion of the legal liability and is never the measure of damages for non-performance of a contract of this kind.

It is an insufficient and, therefore, an unreasonable stipulation, and cannot save the otherwise clearly objectionable condition of which it is a part.

Another question is presented relating to the rule of damages. It is agreed, according to the report of the case, that if the plaintiffs are entitled to recover a greater sum (than forty-eight cents) as special damages upon the facts aforesaid, this court is to determine the rule upon which damages shall be assessed.

The measure of damages in cases of this kind has been much discussed in the text-books and decisions in this country and in England. It would seem to be impracticable to attempt to lay down any single and simple rule, which can be made to apply, without qualification, to every case. There are, however, certain general principles which may be considered as applicable, generally to these cases, and to be now quite well established.

Before considering these principles, with these qualifications and limitations, it may be well to examine the character and exact extent of the message in the case before us. We may then be better able to apply the rules established or admitted, to this particular case. For it is the rule for this case, that we are called upon to define.

We assume that the plaintiffs can prove that the firm in Baltimore, to whom the telegram was addressed, had offered and agreed to sell a cargo of corn at ninety cents per bushel to the plaintiffs; that the telegram contained notice of acceptance of the proposition; that the condition named, "if you can secure freight at ten" (cents), could have been complied with, if the message had been delivered when it should have been; that, if it had been thus delivered, the bargain would have been closed, and the plaintiffs would, at that moment have obtained the cargo at ninety cents per bushel, with freight at ten cents.

The pecuniary value, then, of this telegraphic message was in this, that it contained a part of a contract, and that the final and binding and effectual act, by which the bargain would become operative and complete. It seems clear that such a message has a distinctive and clear pecuniary value, and demands of the party who, for a reward, undertakes to convey it, knowing its contents, the same care and diligence; and that he is subject, at least, to like rules and liabili-

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ties, as if he (not being a common carrier), had undertaken to transport an article of merchandise.

On its face it gives clear intimation that it is of a business character, relating to a distinct and specific contract, and that, according to the well-known custom of merchants, it must have been understood by the operator or agent as an acceptance of an offer to sell a cargo at the price named, if freight at ten cents could be procured.

In this respect it differs from a class of cases to be found in the reports, where the message was so brief or enigmatical, or so obscure, that it gave the operator no notice that it was of any value pecuniarily.

It differs also from another class in this, that it is not a general order to buy, if thought best, or if market had an upward tendency, or if there was a probable chance of profit, or any like condition. This telegram is a distinct acceptance of an offer, at a fixed price, of a cargo. Its binding efficacy was not dependent upon any contingency, or rise or fall in the market. If it had been duly delivered, the plaintiffs would have been, at that moment, the purchasers and owners at Baltimore of a cargo of corn at ninety cents, with freight at ten cents. - It was not delivered, and the plaintiffs were not at that time and place such owners, as between the plaintiffs and defendants, the plaintiffs were entitled to be, at such price. They would have been such, but for the neglect of the defendants. What is the measure of damages? Clearly not the price paid for the transmission only. Paying that back would be rather in the nature of a rescission of the contract, than damages for its non-performance. And we have before determined, that the special condition was not binding so as to exonerate from all other damages occasioned by neglect or want of common care and attention in the performance of the contract and duty assumed.

A more difficult question arises in fixing an exact rule in determining the amount of damages in this case.

The general rule is familiar, and is among the rudimental axioms of the law.

In this State, the general doctrine was laid down at an early day in *Miller v. Mariner's Church*, 7 Greenl. 51, in an opinion of the court drawn by Mr. Justice WESTON in his usually clear, discriminating, and accurate style, and precision in use of language. "In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct

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damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof, and deducible from the non-performance, are not allowed. And if the party injured has it in his power to take measures by which his loss is less aggravated, this will be expected of him. If the party entitled to the benefit of a contract can protect himself from loss, arising from a breach, at a trifling expense, or with reasonable exertion, he is bound to do so."

The above extract, as it seems to us, contains the substance of the whole law applicable to this subject, and the germ from which long chapters and long opinions have been expanded. It is constantly cited as an early and authoritative statement of the legal rule on this subject.

The principles and rules laid down in this case have been re-affirmed in our court in many cases. In *Berry v. Dwinel*, 44 Maine, 255, it is held that "remote and consequential damages, possible gains, and contingent profits are not allowed." The rule was applied in this case to possible or actual loss to plaintiff in the future, which the defendant set up as a defense to recovery of damages, for non-delivery of logs at a stipulated price and time.

Perkins v. P. S. & P. R. R., 47 Maine, 592; *Ripley v. Mosely*, 57 id. 76, and cases there cited. In that case it was held, that when the loss is not speculative nor dependent upon contingencies, but is one of the natural and direct results of the act, it may be recovered. But loss of probable profits is too uncertain and problematical to be a basis for estimation of damages.

In an English case, *Hamlin v. G. N. Railway*, 1 H. & N. 408, it is laid down as a general principle, that no damages can be given on contracts, which cannot be stated specifically.

Redfield, in his chapter on Telegraph Companies, § 1896, thus states it as applicable to such companies: "The company must make good the loss resulting from any default on their part." But what loss? Can a party recover for every loss, or injury which he can show, by facts subsequently occurring, did in truth result to him from the failure of duty on the part of the other party?

The clear preponderance and weight of the decisions are, that the qualification, which was thought formerly to be sufficient to meet all cases, is not satisfactory. That qualification was, that the injury must be the ordinary, natural, or even necessary result of the

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breach. But loss of profits may be clearly shown to have been occasioned by the failure, and from no other cause. So injury and loss may be directly traced to the same cause, when the party is prevented from availing himself, by this breach of one contract, of some other collateral and independent contract entered into with other parties. Or where a party has been prevented from doing some act, or making some investment in his own business, not necessarily connected with the agreement in question.

These damages are disallowed, not because they cannot be traced directly as the immediate and undoubted effect of the breach, but because they are in their nature uncertain and contingent, and, perhaps more decidedly, because they are not such as would naturally flow from such a breach, and could not fairly be considered as having been within the contemplation of the parties at the time of entering into the contract. This rule necessarily excludes all remote, speculative, and uncertain results, as well as possible profits, advantages, and other like consequences which might have arisen, or which it can be shown would have arisen from the performance of the contract. This seems to be the doctrine in other States and in England. *Squire v. Western Union Telegraph Co.*, 98 Mass. 232; *Griffin v. Colver*, 16 N. Y. 490; *Leonard v. New York Telegraph Co.*, 41 id. 544; 1 Am. Rep. 446; *Freeman v. Clute*, 3 Barb. 426; *Blanchard v. Ely*, 21 Wend. 342; *The Sch. Lively*, 1 Gall. 315; *Graham v. Western Union Telegraph Co.* (Colorado), before cited; *Hadley v. Baxendale*, 26 Eng. Law & Eq. 398, a leading case on resulting damages. Other English and American cases might be cited, bearing more or less directly on the subject. They can be found collected in Sedgwick on Damages, and other text-books.

But the negation of certain elements still leaves the true rule undetermined. This, we think is to be found in the application of the principle, which, excluding all uncertain, problematical and contingent profits, holds the party liable for the immediate and necessary result of the breach, and which may fairly be presumed to have been in contemplation of the parties at the time, and are capable of being definitely ascertained by reference to established market rates.

Now, in the case before us, the plaintiffs should have had, at the time when the dispatch should have been delivered, a cargo at ninety cents and freight at ten cents. The natural consequence of this neglect, one which might well be anticipated or be in contemplation

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of the parties, was that the bargain would be lost, and that the cargo might be sold to other parties, or the seller would decline to accept a repetition of the offer, afterward, at same price. Plaintiffs wanted the cargo and had a right to have it at the price named. What was the damage?

Here comes in the second proposition in *Miller v. Mariner's Church*, viz., that the party should not at once abandon all attempts to procure the corn, and rest upon a claim for indefinite and possible profits which he might have made by a rise in the market, if he had obtained the article at the time, but must use reasonable diligence, after notice of the failure, to procure the same quantity, and the lowest freights, at the then market rates.

The sum, therefore, which would be a compensation for the direct loss and injury sustained by the non-delivery of this message, is the difference (if at a higher rate) between the ninety cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise, and the same rule applies to any increase of freight from the sum named, if it be shown that the corn could have been shipped by the sellers, at that rate, if the telegram had been duly received.

In the case of *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, adopts this view, in a case very nearly resembling this in its facts.

Rittenhouse v. Independent Line of Telegraph, 1 Daly, N. Y. 474, where the operator made a mistake in the article ordered, it was held that the company must make good the difference between the price of the article actually ordered, at the time when ordered, and the price of the same article, if purchased as soon as the mistake was discovered.

United States Telegraph Co. v. Wenger, 55 Penn. 262. An order to buy stocks; no reason given why not delivered; a case of negligence; stocks ordered not bought on the day; they would have been, if telegram had been received, but were purchased three days afterward at an advance. That difference, the court say, is undoubtedly the damages the plaintiff has sustained and is entitled to recover. "The dispatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it."

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Leonard v. New York Telegraph Co., 41 N. Y. 544, before cited, a case of mistake; *Griffin v. Colver*, 16 id. 490; *DeRutta v. N. Y. A' & B. R. Tel. Co.*, 1 Daly, 547; *Parks v. Alta California Telegraph Co.*, 13 Cal. 422.

In our own State, in the case of *Berry v. Dwinel*, before cited, the rule, in an analogous case, is thus stated: "When a party contracts to deliver goods at a particular time and place, and no payment has been made, the true measure of damages is the difference between the contract price and that of like goods at time and place where they should have been delivered."

And so it has been held that a common carrier, who unreasonably delays to transport or deliver goods intrusted to him, will be held to pay the difference between the market value at time and place when and where they ought to have been delivered, and the market value at that place on day of actual delivery. And this although no special contract as to time, and no special intended use, and no deterioration in the quality of the article. *Cutting v. G. T. R. R.*, 13 Allen, 381. The same decision has been made by this court in *Ball v. Railroad*—not reported. See *Weston v. G. T. R. Co.*, 54 Me. 376.

APPLETON, C. J., delivered a dissenting opinion.

NOTE.—See note to *Western Union Telegraph Co. v. Graham*, 9 Am. Rep. 121, wherein the cases are presented as to the effect of conditions printed on blanks for telegrams, also as to the rule of damages in actions against telegraph companies for errors in transmission, for failure to transmit and for non-delivery.

In *Tyler v. The Western Union Telegraph Co.*, 8 Alb. Law Jour. 181, decided by the supreme court of Illinois in 1873, the question how far a condition, printed in a telegram, that the company will not be liable for any error in the transmission or delivery of an unrepeatd message is binding, was very fully and ably considered. The facts of the case were these: The plaintiff delivered to defendant, at Chicago, to be forwarded to New York, a message, written upon one of the blanks of the company, in which it was provided that the company would not be responsible for any error in the transmission or delivery of an unrepeatd message beyond the amount paid for sending. The message, as written, directed plaintiff's agent to "sell one hundred (100) Western Union," as delivered to plaintiff's agent in New York, it directed him to "sell one thousand (1,000) Western Union." Plaintiff's agent sold thereupon one thousand "Western Union," at a loss to the plaintiff, by reason of the mistake, of over \$700. In an action of assumpsit to recover the amount so lost, the court held, that the company was liable.

In *Candes v. Western Union Telegraph Co.*, 8 Alb. Law Jour. 293, decided by the supreme court of Wisconsin, in 1873, the court held that a telegraph company cannot, by regulations printed upon a blank upon which a message is written, shield itself from the consequences resulting from the gross negligence or fraud of its agents, or from their entire failure to perform the service, no good excuse for such failure being shown. It also held that where a message is written in cipher, the signification and purport of which are entirely unknown to the agents and operators, the sender of the

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message is entitled to recover for a failure to transmit it, only the sum paid by him for its transmission.

Chief Justice DIXON, delivering the opinion of the court in that case, said: "Aside from the objections resting on the grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists, on the part of the company, to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company and the obligation which it assumes by accepting the payment, the question arising is, whether it can at the same time, and as part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligations to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him. Is it possible for the company, or any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create, an obligation or duty at one and the same moment, and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be regarded in that light, still the objection exists that there is no consideration what ever to support it, and it must be held void on that ground."

In *Manville v. The Western Union Telegraph Co.*, 7 Western Jurist, 611, the supreme court of Iowa held that while a regulation as to repeating messages is reasonable, it will only absolve the company from liability for mistakes caused by uncontrollable causes, such as atmospheric electricity, and that notwithstanding such a regulation a company was bound to employ skillful operators, use proper instruments, and to exercise reasonable and ordinary care in the transmission and delivery of messages. — REP.

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(60 Me. 37.)

Constitutional law — jury trial.

A statute requiring the party demanding a jury to pay the jury fee, and tax the same in his costs, if he prevail, is constitutional.

ACTION of assumpsit. The defendant filed his plea, and indorsed thereon the words: "Defendant demands jury trial," at the same

time refusing to pay the jury fee as prescribed by the statute set forth in the opinion. The court below ruled that defendant was not entitled to trial by jury, except upon the condition that he would first pay the jury fee, and thereupon, the defendant refusing to pay the fee, the case was tried by the judge without a jury, and the defendant alleged exceptions. The questions raised upon the merits are unimportant, and are omitted.

L. B. Dennett, for plaintiff.

Geo. C. Hopkins, for defendant.

APPLETON, C. J. The act establishing the superior court for the county of Cumberland, ch. 151, was approved 14th February, 1868. By § 6 it is provided, that "if the plaintiff desires a jury trial, he shall indorse the same upon his writ at the time of entry. The defendant shall, within fourteen days after entry, file his pleading, and if the plaintiff has not demanded a jury, the defendant shall indorse on his plea his demand for a jury, if he desires one. Whenever a jury shall be so demanded by either party, the clerk shall enter the fact on the docket, and all other cases, except appeals, shall be tried by the justice without the intervention of a jury, subject to exceptions in matters of law, in term time, or if both parties desire, at chambers. The party demanding a jury shall pay a jury fee, and tax the same in his costs, which shall be the same as in the supreme judicial court, if he prevails; but in cases actually disposed of without a verdict, the jury fee, if any has been paid, shall be returned to the party paying it."

By art. 1, § 20 of the constitution of this State, it is provided that "In all civil suits, and all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced; the party claiming the right may be heard by himself and his counsel, or either, at his election."

It will be perceived that the right to a jury trial is given by the statute to either party at his option. Is the provision, by which the party desiring a jury trial is required to pay the customary jury fee, an infringement on the constitutional protection to the right of trial by jury?

The plaintiff, as a preliminary to a trial by jury, has always been

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held to pay the customary jury fee. If on the trial he succeeds, the amount paid is an item of cost, which the law imposes upon the defendant.

By the act under consideration, the defendant, desiring a jury trial, must pay the fee. But the amount thus paid is a charge to be taxed in his bill of costs in case of his success. If unsuccessful, the defendant has only paid what, in such case, the law would compel him to pay.

The argument of inability to pay is alike applicable to the plaintiff as to the defendant. Because the defendant may be unable to pay the required amount, the loss of a jury trial would be no greater deprivation of a constitutional right to him, than to the plaintiff, if he were in the same category.

The prepayment of the jury fee is required of the party desiring a trial by jury. It is just as unconstitutional to require it of the plaintiff when he desires a trial by jury, as it is to require it of the defendant under the same circumstance, and no more so. But the prepayment of a jury fee by the plaintiff has never been deemed an infringement upon the right to a trial by jury. Nor can the prepayment by the defendant be so regarded, when it is made at his own option, and followed by the same consequences as when paid by the plaintiff.

In cases tried before justices of the peace, the defendant when unsuccessful and appealing is required to advance the jury fee. But this has never been held an infringement on his constitutional right to a trial by jury. But what matters it, whether the jury fee is paid by the defendant when he is an appellant or when he is not?

In *Beers v. Beers*, 4 Conn. 535, it was held that the act of the legislature enlarging the jurisdiction of justices was not repugnant to the constitution, as thereby impairing the right to trial by jury. "An instrument," observes HOSMER, C. J., "remains inviolate, if it is not infringed; and by a violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are, at least, virtually of that character. It could never be the intention of the constitution to tie up the hands of the legislature, so that no change of jurisdiction could be made, and no regulation, even of the right of trial by jury, could be had. It is sufficient and within the reasonable intendment of that instru-

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ment, if the trial by jury be not impaired, although it may be subjected to new modes and even rendered more expensive, if the public interest demand such alteration." So in *Jones v. Robbins*, 8 Gray, 329, it was held that a statute, which authorizes a single magistrate to try and pass sentence in a criminal case, but gives the defendant an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the requirement of his giving bail for his appearance there, or in default of such bail, being committed to jail, is not unconstitutional as impairing the right of trial by jury.

The defendant having desired a jury trial was entitled to it, upon complying with the condition invariably attached to such trials in civil cases—the payment of the jury fee. With this he declined to comply. He stands in the same situation as a plaintiff would be in, who neglected or refused to comply with this requirement of law. Declining to make the required payment, the defendant must be held as waiving the right to a jury trial, when he refuses to do what is an essential and reasonable prerequisite to its enjoyment. All that remained to be done was a trial by the judge or the entry of a default. The defendant preferred a trial by the presiding justice, and the remaining inquiry relates to the ruling of the justice upon that trial.

[The remainder of the opinion is unimportant.]

Exceptions overruled.

STATE V. LEACH.

(60 Me. 52.)

Officer — misconduct in office — false certificate by register.

A register of deeds falsely certified over his official signature, that he had examined a title, and found it unincumbered. It was no part of his official duty to make examinations or certificates of title. *Held*, that he was guilty of misconduct in office. TAPLEY, J., dissenting.

INDICTMENT under a statute providing for the removal of register of deeds for misconduct in office.

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The indictment alleged, among other things, that the defendant, a register of deeds for the county of Cumberland, did, on the 2d of April, 1868, then and there, knowingly, purposely, designedly, and unlawfully make, issue and deliver to some person unknown, his official certificate as such register, in the words and figures following, viz.:

“PORTLAND, *April 22*, 1868. ‘This may certify, that I have examined the title of James W. Leavitt to lot situated on State street, Portland, and that I find no incumbrance on the same whatever
“ (Attest) EBEN LEACH, *Register.*”

That said certificate, when thus made, issued and delivered, was false and untrue, and that said real estate, named in said certificate, was not free of all incumbrance, as therein stated, but that then and there, when the same was so made, issued and delivered, there was a valid attachment thereon for the sum of \$15,000, by virtue of a writ against said Leavitt, all of which Leach then and there well knew; that Leach, then and there, knowingly, purposely, designedly, and unlawfully made, issued and delivered said certificate, in his official capacity as register of deeds, for said county, well knowing the same to be false and untrue; and that said Leach was then and there guilty of misconduct in his office of register of deeds for said county, and incapable of discharging its duties against the peace, etc.

2. That the respondent, on April 22, 1868, at Portland, was, and still is, register of deeds for said county, and was then and there guilty of misconduct in his said office of register of deeds in this, that on said day and year, the said Leach, at said Portland, in his official capacity aforesaid, knowingly, designedly, unlawfully, and with intent to defraud, made, issued and delivered to some person unknown, a certain certificate in the words and figures following, to wit: [same as in first count.]

That said certificate was then and there false and untrue, and the said real estate was then and there under a valid attachment on a writ against the said Leavitt for \$15,000, and Leach then and there, when he made, issued and delivered said certificate, well knew it was false and untrue, and that said attachment existed on said real estate against the peace, etc.

The third and fourth counts were similar to the second, without the allegation of the “intent to defraud.”

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The fifth count was like the first, with the exception that immediately following the certificate succeeded the allegations:

That said certificate, at said Portland, on the day and year last aforesaid, so made and delivered by said Leach as aforesaid, was false and untrue, and that the said Leach then and there knew the same was false and untrue in this, that when said certificate was so made and delivered, there was a valid and existing attachment for \$15,000 on said real estate, named in said certificate, by virtue of a writ against said Leavitt, demanding that sum as damages, all of which then and there appeared by the records of said registry of deeds, etc.

It appeared in evidence on the part of the government, *inter alia*, that the respondent was duly elected and qualified as register of deeds in and for the county of Cumberland, and entered upon the discharge of his official duties on January 1, 1868; that Leach detailed the circumstances of the giving of the certificate substantially as follows: "That a few days before making it, while he was busy in the office of the register, some person called and requested the respondent to look up the title to a piece of real estate on State street; that, before he completed the search, the applicant called two or three times; that, when he completed the search, respondent told the applicant that he had gone over the records, and found no mortgage or conveyance, but had found an attachment (*Churchill v. Leavitt*), and pointed it out to the applicant, who replied that he knew all about the attachment, which amounted to nothing; that the applicant said that the respondent might make out a memorandum of the result of his investigation; that the respondent asked the applicant if respondent should mention the attachment in the memorandum, and the applicant replied no, it was of no account, that the applicant only wanted it for his own private use, and upon the whole, that the respondent might make applicant a certificate without mentioning the attachment; that respondent replied he could not make the certificate without mentioning the attachment, whereupon the applicant said he did not want that put in, as it did not amount to any thing; and that respondent was induced to give the certificate, because it was for the applicant's private use.

It also appeared that the respondent testified in the criminal prosecution of *State v. William Chase*, that at the time the respondent delivered the certificate, it was false, and that he knew it.

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One Jerria, called by the government, testified: That in 1868, he was agent for selling real estate; that the certificate in question was presented to witness by one William Chase, who wanted to raise money on a mortgage, when witness told Chase that a certificate from the register of deeds would be required that there was no incumbrance on the property; that in consequence of the information contained in the certificate, witness loaned Chase \$7,000 and took a mortgage on the property referred to in the certificate; that Chase was negotiating for James W. Leavitt, and witness for one Converse, who required a certificate from the register; that witness had no information that an attachment existed on that property when he negotiated the loan; and that the property was worth \$10,000.

“Does it appear that any suitable explanation has been made or attempted? None at all appears until Chase’s trial in January, 1870, four months after the levy.”

The respondent did not testify.

The verdict was, not guilty on the second count, and guilty on all the others.

Thereupon the respondent alleged exceptions.

The respondent also moved in arrest of judgment upon the alleged ground that no offense known to the law was set forth in the first, third, fourth and fifth counts in the indictment.

The presiding judge overruled the motion, and the respondent alleged exceptions.

Davis & Drummond, for respondent.

Thomas B. Reed, attorney-general, for the State.

KENT, J. The indictment in this case is founded upon R. S., 1857, ch. 7, § 15, and is against the respondent as register of deeds for Cumberland county, and was tried in the superior court and comes here on exceptions. That section provides that “when on presentment of the grand jury, or information of the attorney-general to the supreme judicial court, any register of deeds, by default, confession, demurrer or verdict, after due notice, is found guilty of misconduct in office, or incapable of discharging its duties, the court shall enter judgment for his removal from office.” Provision is then made for the issuing of a writ to the sheriff to take possession

of the books and papers belonging to the office, and for the delivery by him of the same to the clerk of the courts.

This provision, giving power to the court to remove a civil officer is, so far as we are advised, the only one of that nature to be found in our statute book. The constitution (art. 9, § 5) gives the power of removal to the governor with advice of council, of every person holding any office, on the address of both branches of the legislature. And it also, in the same section, provides that "every person holding any civil office, under this State, may be removed by impeachment for misdemeanor in office." In the single case of register of deeds, a like power is given to the court, when, under an indictment or information against that officer, he is found guilty of "misconduct in office."

It is to be observed, in the first place, that this section is not one providing for the punishment of the individual offender by fine or imprisonment for an offense against its provisions. It is not in that sense a strictly penal statute. It is rather in the nature of an inquest of office, and the consequences of a conviction under it reach only to the possession of the office and its emoluments. It seems much like the substitution of the court, for the legislature when acting by impeachment or address, as provided in the section of the constitution before alluded to. These distinctions may be of some importance in giving a construction to the statute, and in determining the limits to be given to the language used.

The principal question in this case is, what did the legislature mean by the words "misconduct in office?"

The charge is, that the respondent, being register of deeds, on application to him, made and signed in his official capacity a certificate that he had examined the title of an individual named to a lot of land in Portland, within his county, and found no incumbrance on the same whatever; whereas, in fact, there was an incumbrance by an attachment to the amount of \$15,000, which, as by law required, was entered in the registry and appeared on the records of the same; and the respondent well knew the fact when he gave the certificate, and well knew, at the time, that his certificate was false, and he knowingly, purposely, designedly and unlawfully made and issued the certificate. In one count of the indictment he is charged with an "intent to defraud." But this intent is negatived by the jury. But with this intent eliminated, we have enough left to say, without hesitation, that the facts charged and

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in substance admitted, show "misconduct" in whatever light they are viewed. They show an act done, by one who may well be presumed to know the facts, having the custody and charge of the records, which was a false statement of the state of the title to a particular parcel of real estate, and well known by him to be false, and issued or delivered to another person, known or unknown, without qualification or restriction, which statement was not general, but particular in this, that it certified to an examination of the records touching this specific parcel of land. Although there might be no actual corruption shown by way of bribe or pecuniary inducements, yet the making, issuing and certifying such false statement, knowing it to be such, and knowing that it was calculated to deceive and mislead honest men, who might rely upon it unhesitatingly in their transactions, was an unjustifiable act, whether done by a man in office or by one out of office, and is mildly characterized by the word "misconduct" if we prefix no adjective denoting the moral quality of the act.

But the respondent places his defense primarily and chiefly upon the distinction he makes between the misconduct of the act viewed as the act of a private individual, and misconduct in office. His counsel stated the point clearly in his first requested instruction, as follows: "That what the statute calls 'misconduct in office' relates to some act which it is the person's official duty to perform. And as it is no part of the official duty of the register of deeds, to examine the records and give certificates of title, the certificate given by the defendant in this case, even if given corruptly and fraudulently, did not constitute misconduct in office." This request was refused, and the following instruction given:

"I instruct you, that if you find that respondent made, signed and delivered to any person the certificate in question, at his office, at the time of its date, knowing it to be false at the time in a material particular, the act may amount to misconduct in office; it is evidence which would authorize a verdict against the respondent on all the counts but the second." The second count alone charged that the certificate was given with intent to defraud. On this count the jury found the accused not guilty. On all the other counts they found him guilty.

Was this ruling erroneous? It was so clearly if the proposition contained in the request is the true construction of the statute. It is quite clear that the certificate in question is not one that the

register was bound by law to give, and that it was not one which could be used as legal evidence of the fact in court. If, therefore, the proof of misconduct in office, under this indictment, is to be strictly limited to evidence which relates to some act which it is the person's official duty to perform, the ruling was wrong.

We do not incline to the opinion that this statute intended to confer upon the court the unlimited power to remove an individual from office, upon proof of facts showing immoral or felonious conduct, entirely disconnected from his office, and not being, or purporting to be, in any sense an official act, or assuming to be such.

This apparently unlimited power to remove for private, as well as public or official acts done in or by color of office, is given to the governor and council on address by both branches of the legislature. But this does not cover the case before us. The act here complained of is one that purports to be an official act, and has relation to the records of which he is the legal custodian. It is a certificate of fact, of what does and what does not appear on those records, which it is his duty to record, and to certify, and to give attested copies of, which may be used as evidence. It is true that any private person may examine the records of deeds, and give a certificate as to the result of his search. If such private person should give to his employers a certificate which is entirely false, and known by him to be so, he could not be indicted under this statute. But he might be liable to indictment at common law, if any one was defrauded thereby, and be also liable to an action for damages. But the certificate in question derived its chief importance from the official signature as "Register."

It was calculated to mislead and deceive even the most cautious, and chiefly because it came with the color of office on its face.

On a careful examination of the statute in question, and of its objects and the wrongs and misdoings which the legislature had in view, we cannot come to the conclusion that it was the intention to limit the misconduct in office, however flagrant, to acts which it can be shown were strictly such as the law required or directly authorized the officer to perform, and which had legal efficacy by reason of the official certificate. We think the legislature did not intend this to be a strictly penal statute, for the punishment by fine or imprisonment of the individual offender, but intended by this mode to reach every register of deeds who should use his office or his official name in a false or fraudulent manner, or give currency or credit

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to any official certificate or other paper, which might be used for the purpose of fraud or imposition to the damage of honest men. If a register should write out what purported to be a copy of a deed of a lot of land, none such being in existence, and should certify thereon, falsely, that that deed was on the records of the county, naming the book and page, no one would question that such an act was "misconduct in office." But if he should certify under his official signature, that there was no deed on record from A. to B. of a particular lot, when there was one there, and he knew that it was there, it might be said that this would not be a certificate which he was bound to give, and that it had no legal efficacy, yet who can doubt that such an act would be gross misconduct in office. The same may be said of records of attachment.

When an officer acting in his official capacity, and under his official signature does an act which has relation and refers to matters belonging to his department, and under his particular charge, and he acts knowingly, designedly, falsely, and the act is one calculated to mislead, and one that in its nature may be used for purposes of fraud or imposition, it is misconduct in office, within the intent of this statute. And this, although no actual corruption by bribery or otherwise is proved. The mischief is the same, if the wrong was the result of unpardonable weakness in listening and yielding to the solicitations or representations of a fraudulent schemer, as when it is the result of a direct bribe. The law did not intend to allow a man to remain as the custodian of the records of all the titles to lands in the county, and to give official certificates and copies of a most vital character, who is shown to have been guilty of giving knowingly a false certificate, touching what those records contained or did not contain. And this would seem to be an almost necessary rule to protect the public, when we find that such remarkable proceedings on his part as are developed in this case, made so slight an impression upon him, and were considered of so trivial a character, that he cannot remember who the individual was who procured the certificate, although he had had several conversations with him, and had been persuaded by him to give the certificate against his convictions and knowledge.

It is well known that in our country, generally, intermediate title deeds do not pass with the title, from grantor to grantee as in England, when the land owner has possession of all the original deeds, often from a remote antiquity. Hence our rule, which

allows a party to prove the successive links of his title, by copies of deeds, certified by the register of the county, in whose registry they are recorded. This would soon become a dangerous and impracticable rule, if the most unbounded confidence is not reposed in the integrity and correctness, and even scrupulous care of the register. Proof of one intentionally false certificate, by which an imperfect title was supplemented, would lead to such mistrust, that the whole rule would be abrogated, which is now so useful and satisfactory.

The law will not allow a person who, assuming to be and acting as an officer, exacts illegal fees or does other illegal acts as such officer, to defend on the ground that he was not in fact such officer, duly qualified. The law says to him, "you assumed to act as an officer, and you led another party to regard you as such, and to pay you money in that capacity, and you shall not now be allowed to deny your official character." May not the law, with equal propriety, say to an officer: "You undertook to do an act and give a certificate in your official character, touching matters belonging to your office, calculated to mislead honest men, and you shall not shelter yourself from a charge of misconduct in your office by setting up the plea that it was not an act which the law required you to do."

There is a manifest distinction between a case of misconduct, resulting in loss of office only, and the charge of a legal crime, which requires proof of criminal intent before conviction, and punishment of the person by fine or imprisonment after conviction. In the latter there must be a direct charge in the indictment of the criminal intent and criminal act. "Misconduct" does not necessarily imply corruption or criminal intention. We think the legislature used the word in its more extended and liberal sense. This statute is not, strictly speaking, a penal statute, but rather remedial and protective.

Our conclusion on this part of the case is that the first instruction given, as before stated, was correct, and the requested instructions on this point were properly withheld.

[The remainder of the opinion relates to unimportant questions as to evidence.]

TAPLEY, J., dissented.

Exceptions overruled.

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WESTBROOK MANUFACTURING COMPANY v. GRANT.

(60 Me. 88.)

Time — computation of — "fraction of a day." Bankruptcy.

A debtor's property was attached on March 8 at 7 o'clock P. M., and his petition in bankruptcy was filed July 8, succeeding, at 8 o'clock P. M. *Held* that the maxim that in law there is no fraction of a day, did not apply and that the attachment was dissolved under section 14 of the bankrupt act, dissolving attachments made within four months of the commencement of proceedings in bankruptcy.

Action on the case against the defendant as sheriff of Waldo county for failure to surrender property attached on a writ in favor of plaintiff against one Treat.

The deputy of defendant, under said writ, attached the said Treat's property at 7 o'clock P. M., March 8th, 1867. On the 8th of July, then next, the petition in bankruptcy of said Treat was filed at two o'clock and fifty minutes P. M. The court below held that the proceedings in bankruptcy dissolved the attachment and ordered judgment for the defendant. The plaintiff alleged exceptions.

W. L. Putnam, for plaintiff.

Howard & Cleaves, for defendant.

WALTON, J. This is an action against the sheriff of the county of Waldo, for the alleged misdoings of his deputy in not keeping property attached. The defendant claims that the attachment was dissolved by the debtor's going into bankruptcy within four months after it was made.

The fourteenth section of the United States bankrupt act declares that any attachment of the bankrupt's property, made within four months next preceding the commencement of the proceedings in bankruptcy, is thereby dissolved.

The attachment in this case was made March 8, 1867, at seven o'clock in the afternoon. Proceedings in bankruptcy were commenced July 8, 1867, at two o'clock and fifty minutes in the after-

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noon. The time between the two events is four hours and ten minutes less than four months. It is, therefore, clear that the attachment was, in fact, made within four months next before the proceedings in bankruptcy were commenced. We fail to perceive any good reason why the attachment shall not be held to have been dissolved. Certainly it must be, if the exact truth and an accurate computation of the time are allowed to prevail.

The objection is, that such a decision will conflict with the maxim that in law there is no fraction of a day. But this maxim is a self-evident fiction; and, as Judge STORY said, in *Richardson's case*, 2 Story, 571, is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case, and is never allowed to operate against the right and justice of the case. It is undoubtedly a very useful maxim when properly applied, as in the service of legal precepts and notices generally, and in mercantile contracts, as it avoids the inconvenience of endeavoring to ascertain with precision at what hour of the day the precept or notice was served, or at what hour a note or bill of exchange, payable on time, was signed, etc. But in a case like this, where the conflicting claims of creditors are to be determined by an accurate computation of time, and we have the means before us of computing the time accurately, and there is no inconvenience to be avoided, we think that any maxim which should lead the court to decide contrary to the truth, would be misapplied. The bankrupt act makes the commencement of the proceedings in bankruptcy the initial point, or *terminus a quo*, of the four months in question; and with positive record evidence before us, of the exact time when that event occurred, it seems to us it would be a plain and willful violation of the statute to commence the computation at any other time. We think the computation in this case should commence on the 8th of July, 1867, at two o'clock and fifty minutes in the afternoon, that being the precise time when the proceedings in bankruptcy were commenced, and by then reckoning backward four calendar months we shall reach the 8th of March, 1867, at the same hour of the day, namely, two o'clock and fifty minutes in the afternoon. By thus measuring the time truly and accurately, we shall see that the attachment was within the four months by four hours and ten minutes; for it was not made till seven o'clock in the afternoon of that day. It being thus demonstrated that the attachment was within four months next preceding the commencement of the pro-

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ceedings in bankruptcy, our conclusion is that it was thereby dissolved. And in this conclusion we think we are not only justified by reason and the express requirements of the statute, but also by authority.

Professor Parsons says that in the application of the insolvent laws, the very hour is inquired into; that he is aware of no cases where the technical rule of the law, that no fraction of a day can be allowed, has been adhered to in bankruptcy, save the *Matter of David Howes*, 6 Law Reporter, 297; and the *Matter of Wellman*, 7 id. 25, where the doctrine laid down in the first case is maintained and defended; and he expresses the opinion that the views of the judge, though able, savor of technicality. He says further, that the reason, or at least the justice, of allowing the exact time to be inquired into, is obvious; that if one's rights depend upon whether a certain thing was done more or less than a certain number of months before another, it is as proper to ascertain the exact time as it is when there is a question whether an attachment of land, or the record of a conveyance, was first made. Pars. Merc. Law (2d ed.) 282-3.

Godson v. Sanctuary, 4 Barn. & Adol. 255, is a case directly in point. There the bankrupt's goods had been seized on execution, and the question was, whether more or less than two calendar months had elapsed between the seizure and the time when he went into bankruptcy, and whether, in computing the time, the court could take notice of the fraction of a day; and the court held that they could. "If," said Baron PARK, "the fraction of a day be taken into account (as it may), it would appear that more than two calendar months had elapsed between the time of the seizure and the issuing of the commission; that is, between eleven o'clock of the forenoon of the 13th of August, and twelve o'clock of the 13th of October; because sixty-one complete days, which are the two calendar months, would have elapsed by eleven o'clock of the 13th of October, and the commission did not issue until twelve or one o'clock of that day."

Mr. Powell says that the legal fiction that there is no fraction of a day, like all other legal fictions, holds good only in respect of the ends and purposes for which it was invented; that when it is urged to an intent not within the reason or policy of the fiction, the truth may be shown; that the presumption of law that an act done on any particular day was done the first moment of that day (which

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is only another mode of saying there is no fraction of a day), can never operate where there is positive evidence of the fact; for the positive evidence must always control the presumptive; and he refers to many cases in illustration of these propositions. Powell on Powers, 681-7.

And in *Bigelow v. Willson*, 1 Pick. 485, Mr. Justice WILDE says, "This maxim is a fiction of law, and when it is material to distinguish, the truth may be shown; for a fiction of law, introduced for the sake of convenience and justice, ought never to be allowed to work a wrong; thus, when it is necessary to determine the priority of two attachments, the precise time of each attachment may be shown; and so in many other cases."

We think these authorities abundantly justify us in the conclusion to which we have come, and which we have already expressed. Many others to the same effect, both English and American, could be cited; but we deem it unnecessary to do so. And we will add that this conclusion renders it unnecessary for us to enter the vortex of conflicting decisions, as to whether, in the computation of time from an act done, the day on which the act is done should be included or excluded. A very good review of the authorities upon this point will be found in 4 Am. Law Reg. (new series), 222, in which the learned writer comes to the conclusion that under statutes and rules of court, the current of authorities runs strongly in favor of excluding the day on which an act is done, an event happens, or of a date referred to, in the computation of time therefrom; and several of the decisions in this State, and the leading case of *Bigelow v. Willson*, 1 Pick. 485, are among the authorities cited in support of the conclusion. If we should adopt the same view, the result would be the same as that to which we have already arrived.

Exceptions overruled.

Allen v. Inhabitants of Jay.

ALLEN v. INHABITANTS OF JAY.

(60 Me. 124.)

Constitutional law — towns cannot loan credit to private enterprises.

The legislature cannot constitutionally authorize a town to loan its credit to persons who will, in consideration thereof, maintain a manufacturing enterprise in the town for their own private emolument.

PETITION of Joshua Allen and others, taxable inhabitants of the town of Jay, against the inhabitants of the town and the selectmen thereof.

The petition alleged substantially —

That the petitioners are taxable inhabitants of Jay; that the town, on April 21, 1870, at a legal meeting called therefor, passed the following vote (see opinion); that so much of the vote as assumes to authorize the town to loan its credit for the amount and purpose, and upon the conditions therein named, and the authority assumed thereby to be confirmed upon the selectmen of Jay to issue bonds in the manner and for the purposes indicated in said vote, were and are without authority of law, the town having no legal right or power to authorize the acts complained of, and which, if done, will be in derogation of the rights of the petitioners and other tax payers in town; and that the petitioners are informed and believe it to be the intention of the selectmen named to issue the bonds, under the vote, to the amount of \$10,000 to said Hutchings and Lane, in accordance with the vote.

And they pray that the selectmen named, and their successors, be enjoined from issuing or negotiating such bonds for the purposes and to the uses named or contemplated in said vote, and that the inhabitants and their officers and servants be alike enjoined — and for process.

On March 2, 1871, notice was ordered upon the respondents returnable on March 11th, to be heard by the judge who should preside at the March term in this county, the hearing to be whether or not a temporary injunction should issue. At the hearing, a temporary injunction was granted. Thereupon it was agreed to submit the case to the law court, upon the facts stated, together with Private Laws of 1871, chap. 716. And if the complainants were entitled to the relief claimed, the court to issue the proper decree.

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Robert Goodenow, for petitioners.

S. Belcher, for respondents.

APPLETON, C. J. A town meeting of the inhabitants of Jay was duly called to see if the town would loan its credit to Hutchins & Lane, on certain terms, provided "said Hutchins & Lane shall move their new saw-mill and box factory from Livermore Falls to Jay Bridge, and also put in operation one run of stones for grinding meal; and establish their manufacturing business as soon as the month of September, A. D. 1870, at or near Jay Bridge."

At a legal meeting held upon this call on April 19th, and by adjournment on April 21, 1870, the town "voted to loan their credit to the amount of ten thousand dollars, at six per cent annually, to H. W. Hutchins and B. R. Lane, provided said Hutchins & Lane will invest the amount of from twelve to thirteen thousand dollars in building a steam saw-mill, box factory machinery and land; also to put in one run of stones for grinding meal, to be located at or near Jay Bridge, and to keep the above-named property in good repair, and also keep it amply insured, and to cause said manufacturing business to be carried on for a term not less than ten years, said Hutchins & Lane to pay all the interest, and ten per cent of the principal annually, after three years," the town to be secured by a mortgage of the mill, machinery and land, "at the rate of one dollar for every seventy-five cents thus loaned by said town, and the selectmen are hereby authorized to issue town bonds for the above amount, payable in yearly installments after three years, at six per cent interest annually, viz.: one thousand dollars the first year, and nine hundred dollars each year for the ten succeeding years, provided the whole amount shall be necessary to establish said manufacturing business."

The legislature passed an act, chap. 716, approved February 25, 1871, in the following terms:

"Whereas, upon due investigation and consideration, we deem it for the benefit of the town of Jay, and of the people of this State, said town is hereby authorized to loan the sum of ten thousand dollars to Hutchins & Lane, in accordance with a vote taken by said town on the 21st day of April, eighteen hundred and seventy, for the encouragement of manufacturing in said town."

The complainants, ten taxable inhabitants of Jay, under R. S., ch

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77, § 5, by which this court has equity jurisdiction, "when counties, cities, towns, or school districts, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation, or to pay money from their treasury," have filed a bill in equity, praying that the defendants and all their officers may be enjoined from issuing certain bonds, duly described in the bill, the issue thereof being for a purpose not authorized by law.

The purpose is obvious, and the inquiry is, whether the purpose is one authorized by law?

Whether the loan be of town bonds or of money, as, if the loan be of bonds, the town must ultimately be liable for their payment, and as the payment is to be raised by taxation, matters not. The question proposed is whether the legislature can authorize towns to raise money by taxation, for the purpose of loaning the money so raised to such borrowers as may promise to engage in manufacturing or any other business the town may prefer, for their private gain and emolument. Is the raising of money to loan to such persons as the town may determine upon as borrowers, a legal exercise of the power of taxation? Ultimately, it will be found that the question resolves itself into an inquiry, whether the legislature can constitutionally authorize the majority of a town to loan their own and the money of a minority raised by taxation and against the will of such minority, as such majority may determine.

A tax is a sum of money assessed under the authority of the State, on the person or property of an individual for the use of the State. Taxation, by the very meaning of the term, implies the raising of money for public uses, and exclude the raising if for private objects and purposes. "I concede," says BLACK, C. J., in *Sharpless v. Mayor*, 21 Penn. 167, "that a law authorizing taxation for any other than public purposes is void." "A tax," remarks GREEN, C. J., in *Camden v. Allen*, 2 Dutch. 839, "is an impost levied by authority of government, upon its citizens or subjects for the support of the State."

"No authority, or even *dictum*, can be found," observes DILLON, C. J., in *Hanson v. Vernon*, 27 Iowa, 28; S. C., 1 Am. Rep. 215, "which asserts that there can be any legitimate taxation when the money to be raised does not go into the public treasury, or is not destined for the use of the government or some of the governmental divisions of the State."

If there is any proposition about which there is an entire and uni-

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form weight of judicial authority, it is that taxes are to be imposed for the use of the people of the State in the varied and manifold purposes of government, and not for private objects or the special benefit of individuals. Taxation originates from, and is imposed by and for the State.

In this case the vote of the town of Jay, and the act of the legislature passed to enable the town to carry that vote into effect, are both before us. Taking the vote of the town in connection with the article in the warrant calling the meeting, it seems that Hutchins & Lane had a "new saw-mill and box factory at Livermore Falls," which they were then carrying on at that place, and the town of Jay proposed to loan their credit for ten thousand dollars, and issue bonds of the town for that amount, if they would remove their saw-mill and box manufactory, and put in one run of stones for grinding meal, to be located at or near Jay Bridge. The vote contemplates a mere matter of private business, the removing of certain business from one town to another, whereby the town to which the removal is made is expected to be a gainer by encouraging manufactures therein, and the town from which the removal is made is to be a loser to precisely the same extent by their removal therefrom.

Capital naturally seeks the best investment, or its owners do. Those who by industry and economy have become capitalists are more likely to invest it well than those who, having gained none, have none to lose. The sagacity shown in the acquisition of capital is best fitted to control its use and disposition.

It is obvious, that, if the removal from Livermore Falls would be made without special inducement; in other words, if the prospect of profit at Jay Bridge were sufficient to induce Messrs. Hutchins and Lane to move their saw-mill, etc., without any special offer of the defendant town, there would be no necessity of making such offer. It is not readily perceived that raising money under such circumstances would be of public benefit. If they should not so deem it, and it is not advantageous on the whole for them to make the removal, then it is a premium offered for them to make a removal injurious to their interest, and which they would not otherwise make, and of sufficient magnitude to induce them to meet the probable loss. Still less can it be conceived to be of "benefit" in such case to promote losing enterprises.

It is said that it induces enterprises which would not otherwise

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be undertaken. But why not undertaken? Every man is the best judge of his interest. There may be exceptions, but such is the general rule. Now, why is not capital invested at Jay Bridge? The answer is obvious. No one having capital to invest or loan is willing, for any existing prospect of gain, to invest or loan money to be thus invested. The want of existent capital or sufficient probability of profit is the reason why the proposed undertaking has not been carried into operation.

The idea seems to be that thereby capital would be created. But such is not the case. Capital is the savings of past earnings ready for productive employment. The bonds of a town may enable the holder to obtain money by their transfer as he might do by that of any good note. But no capital is thereby created. It is only a transfer of capital from one kind of business to another.

Nor is capital created by the raising of money by taxation. If the wealth of the country were increased by taxation, the result would be, the higher the taxes the more rapid the increase of its wealth. But the reverse is the case. The wealth of the country is lessened by the time spent in assessing and collecting taxes, and by the taxes collected, if unproductively expended.

Is the removal of the new saw-mill, etc., by Messrs. Hutchins & Lane, a public or private enterprise? Hutchins & Lane are now at Livermore. They propose to remove to Jay Bridge. Is it their interest alone which they will consider. But why remove? It is no more a public purpose than any other removal of manufacture from one town to another. The town of Jay is to have no share in the anticipated profits of Messrs. Hutchins & Lane. The State is not to be a partaker of their gains. The new mill, etc., being removed, the town of Jay stands in precisely the same relation to it as other towns to new or old mills within their limits, so far as regards any public benefit to be derived therefrom. The timber of the inhabitants is sawed at the usual compensation. Their grists are ground for the same customary toll as those of others.

The industry of each man and woman engaged in productive employment is of benefit to the town in which such industry is employed. This can be predicted of all useful labor—of all productive industry. But because all useful labor, all productive industry conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of one special kind of manufacturing? If so, then there is no kind of labor, no man-

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ufacturing for which the minority of a town may not be assessed for the benefit of an individual. There is nothing of a public nature in the new saw-mill of Hutchins & Lane, any more entitling them to special aid than the owners of any other saw-mill. The sailor, the farmer, the mechanic, the lumberman, are equally entitled to the aid of coerced loans to enable them to carry on their business with Messrs. Hutchins & Lane. Our government is based on equality of right. The State cannot discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others. While the State is bound to protect all, it ceases to give that just protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and particular and special industries, at the cost and charge of the rest of the community.

Unless there is something peculiar and transcendental in the new saw-mill to be removed, and in the grist-mill to be erected, and in the labor of Messrs. Hutchins & Lane, it must stand in the same category with other saw-mills and grist-mills, which are and have been, and will be built, and other laborious industries, which are pursued for private gain and emolument.

The alleged justification for raising money to be loaned to private individuals for their own profit, arises from the supposed public benefit to be made of the money so loaned. But the moment the loan is effected, the bonds and money raised from their sale become the bonds and money of the person borrowing, and subject to his control. The town has lost all power over the use and disposition of their loan. True, it may sue for any violation of the contract, if any is made, in reference to the manner of using the bonds or money loaned. The loan, when once made, becomes like all other loans. The other borrower has it. It is his. The loan effected, there is the end of the matter.

The question recurs, can the town raise money by taxation, merely to loan again to individuals for their own purposes? for it has been seen that the loan effected, the town loaning cannot control the use of the loan, and the loan is merely for the benefit of the individual borrowing. The bonds to be loaned, or the money to be loaned are in the hands of the loaning committee. It is to be loaned for a longer or shorter time, upon security good, bad, indifferent; fortunate, if only the latter. Is the loaning of bonds or money by the town, in any respect different from the loaning of

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money by individuals? Does the mere fact that the town makes the loan irrespective of any other consideration make the loan a public "benefit" more than, or different from any other loan by an individual or banking corporation having funds to loan?

That a town cannot raise money to divide again among its inhabitants was conclusively settled, long ago, in this State, in *Hooper v. Emery*, 14 Maine, 379. "To contend," observes SHEPLEY, J., "that towns have the power to assess and collect money for the purpose of distributing it again according to numbers, is to ask for a construction, not only entirely unauthorized by the language of any statute, but in direct opposition to the language of limitation employed in giving powers to towns to grant money. It not only does this, but it asks the court to give a construction to statutes, which would authorize towns, if so disposed, to violate the principles of moral justice. For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town had passed into and out of the treasury; and until an equalization of property had been effected, as nearly as it could be expected to be by placing it all in one common fund, and then dividing it by numbers, *per capita*, without distinction of sex or age. Such a construction would be destructive of the security and safety of individual industry and exertion. It would authorize a violation of what is asserted in our 'declaration of rights,' to be one of the natural rights of men, that of acquiring, possessing, and protecting property. Such a construction would authorize a violation also of that clause in the constitution of this State, which provides that private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it. No public exigency can require that one citizen should place his estates in the public treasury for no purpose, but to be distributed again to those who have not contributed to accumulate them, and who are not dependent on public charity."

But whether the money raised is to be distributed *per capita* or loaned, can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select for such purposes as it may favor, with such security or without security, as it may elect, property ceases to be protected in its acquisition or enjoyment. Whether the estates of citizens are to be placed in the public treasury for the purpose of dividing them,

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or of loaning them to those who have not accumulated them, matters not. In either case, the owner is despoiled of his estate, and his savings are confiscated.

If the loan be made to one or more for a particular object it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry, thereby aided, and is one adverse to and against all individuals, all industries not thus aided.

If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected.

If it were proposed to pass an act enabling the inhabitants of the several towns by vote to loan horses or oxen, or to lease houses to any individual for his private gain, whom the majority may select, the monstrous absurdity of such legislation would be transparent. But the mode by which property would be taken from one or more and loaned to others can make no difference. It is the taking to loan, or otherwise disposing of property for private purposes, against the consent of the owner, that constitutes the wrong, no matter how taken. Whether the horse be taken from the reluctant owner to be loaned to some favorite livery-stable keeper or the loan to be of money raised by the collector on its sale or by the payment of the tax to avoid such sale, does not change the result. In either case the horse or the value thereof is loaned by others, without the owner's consent. If a part of one's estate may be taken from him and loaned to others, another and another portion may be taken and loaned until all is gone.

By the constitution of this State, "certain natural inherent and inalienable rights" are guaranteed to the citizens of this State, "among which are those of . . . acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." What motive is there for the acquisition of property, if the tenure of the acquisition is the will of others? How can our property be protected, if the legislature can enable a majority to transfer by gift or loan, to certain favored and selected individuals through the medium of direct taxation, such portions of one's estate as they may deem expedient? Men only earn when they are protected in the acquisition, possession, and enjoyment of their property. The barbarous nations of Asia have neither industry nor capital, the result of saving, for the reason that property is without protection. Where is the protection of property if one's money or his goods can

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be wrested from him and loaned to others? Where is the difference between the coerced contribution of the tax-gatherer to be loaned to individuals for their benefit, and those of the conqueror from the inhabitants of the conquered territory? If one's money may be taken from him without and against his consent, to be loaned to an individual whom he would not trust, for a time which might be inconvenient for a purpose which he might deem injudicious, what protection is afforded him? What would be thought of a statute requiring individuals to give their notes to others to be discounted for their special benefit, or to raise money to be thus loaned? What differs it whether individuals are compulsorily required to loan their notes on time to others, to be discounted for such others, or the bonds of the town are issued to be loaned, which the citizens may ultimately be compelled to pay? All security of private rights, all protection of private property is at an end, when one is compelled to raise money to loan at the will of others, or to pay his contributory share of loans of money or bonds made to others for their own use and benefit, when the power is given to a majority to lend or give away the property of an unwilling minority.

Further, by the constitution, "private property shall not be taken for public uses without just compensation, and unless public exigencies require it."

The right of eminent domain is an attribute of sovereignty. It is the right to seize and appropriate specific articles of property for public use when some public exigency requires it, and not otherwise.

But this is not the case of taking private property under the right of eminent domain, but of taking it under the power of taxation. But the power of taxation, as well as the right of eminent domain, has its limits, which cannot be constitutionally transcended.

In his answer to certain inquiries proposed by the legislature of this State, 58 Me. 616, Mr. Justice TAPLEY uses the following clear and expressive language: "Without entering at this time into a discussion or recapitulation of the reasons for the rule and the necessities which require it, I hold that the taking of private property, against the will of the owner, must find a justification in some public use and under some public exigency, and accompanied by a just compensation, and this is true whether the property be a direct seizure of it in specie and irrevocably committing it to a use, or

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taken by the indirect method of a loan, accompanied by some fancied or real security for a subsequent re-imbusement."

"Some distinction has been sought to be made between the right to seize specific articles of property for public use, and obtaining money through the ordinary forms of taxation, and we sometimes have a justification under the taxing power of the government. I am not able to perceive the soundness of the distinction. I understand that the right and power of taxation rests upon the right, as described by Judge STORY, 'of the sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty to public purposes. The difference is in the mode of taking only.'"

Three elements are required to bring a case within the provision of the constitution under consideration—a public use, a public exigency, and a just compensation.

Is the removal of a new saw-mill, by the owners, from one town to another adjacent, to be there carried on by themselves for their own profit, for the public use? Is the building of a new grist-mill, the toll to be taken by the builders, for the public use?

Is it any more for the public use than any other industry, the benefit of which incidentally results to the public, but which is carried on for private gain? If Messrs. Hutchins & Lane were to saw for the public without compensation, or grind all grist brought to their mill without toll, the saw-mill and the grist-mill might be deemed public, precisely as a court-house or State house or highway is public; but it is not pretended that such is their intention. They remove because more sawing is to be done, and more tolls are to be taken. The charges are not to be lessened. The saw-mill and the grist-mill are private property, as are all other mills and farms owned by individuals, carried on for their own use and profit, and enacting that they are for a public use, without changing the rights of the public in the least degree, as to their right to use them cannot alter the question. It is beyond the legislative power, by force of an enactment to make that public which is essentially private.

But a public use is not all. Is there any public exigency existing requiring the removal of the new saw-mill of Hutchins & Lane from Livermore Falls to Jay Bridge, to be there carried on for their benefit? Does the public exigency require the building of a new saw-mill there? If there are such public use and public exigency,

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then anybody's land, or mill site and land, may be taken from him by vote of the town, and leased to a lessee to be selected and voted for by the majority, and his money may be wrested from him by the tax gatherer, to pay for the mill to be erected thereon.

The remarks of Mr. Justice WOODBURY, in the *West River Bridge Company v. Dix*, 6 How. 545, are very pertinent and applicable to the question under consideration: "Nor do I agree that, in all cases of public use, property which is suitable or appropriate can be condemned. * * * But the doctrine that this right of eminent domain existing for every kind of public use, or for such use when merely convenient, though not necessary, does not seem to me, by any means, clearly maintainable. It is too broad, too open to abuse. When the public use is one, general and pressing like that often in war, for sites of batteries or for provisions, little doubt would exist as to the right.

"But when we go to other public uses not so urgent, not connected with precise localities, not difficult to be provided for without this right of eminent domain, and in places where it will be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for a public use for a marine hospital or a State prison?

"So a custom-house is a public use for the general government, and a court-house or jail for the State; but it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist which is sufficient to justify so strong a measure."

But if there is no such exigency in the cases mentioned, even where the use is public, for taking private property without consent, still less can there be such exigency where the use is private. If there is no such exigency as will justify the taking of a man's land for a jail or court-house, still less is there for taking his mill site which he may wish to occupy, or his money which he may wish to use, to lease the one and loan the other, or any portion thereof, to enable Messrs. Hutchins & Lane to place their new saw-mill, or to erect a new grist-mill thereon, or to furnish them with funds to carry on their own business.

Neither is there found the just compensation which the constitution requires. The possible, contingent and indirect benefit resulting from a manufacturing business, the prospects of which are such

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that the manufacturer will not invest his own, the prospects of which are such that he either will not or cannot borrow funds for the purpose, and the only mode of obtaining them is the enforced contribution from those who have no funds to loan, or, having them, have no faith in the object for which the contributory assessment and collection is made, nor in the individual for whose use and profit they are collected, assuredly is not the just compensation contemplated. If the result proves fortunate, which can hardly be anticipated, the indirect benefit is no just compensation to those who have no participation in the profits. If unfortunate, it is still more difficult to perceive the "public benefit" likely to result from an unsuccessful and disastrous speculation.

That the money may possibly be repaid is not the just compensation justifying a compulsory loan. It may never be repaid, and then where is the compensation? Besides, the true question is, whether a man is to lend his own money or others are to loan it for him, and if he is unwilling to advance to a tax gatherer for others to loan, the legislature can constitutionally authorize the sale of his property, or commit him to jail for non-payment.

The constitution further provides that no person shall "be deprived of his life, liberty, property or privileges but by the judgment of his peers or the law of the land." Property taken by taxation is not taken by the judgment of one's peers. A statute in direct violation of the essential principles of justice, is not "the law of the land" within the meaning of the constitution. Every citizen holds life, liberty and property by the law and under its protection. Every enactment is not of itself and necessarily the law of the land. To declare it to be so would render this portion of the constitution nugatory and ineffectual. The phrase is adopted from Magna Charta. "As to the words from Magna Charta," observes JOHNSON, J., in *Bank of Columbia v. Okely*, 4 Wheat. 235, "after volumes spoken and written, with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." But can any one conceive a more arbitrary exercise of the powers of government than the enforced collection of money from one man to loan the same to another?

The constitutional provision that "private property shall not be

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taken for public uses without just compensation, nor unless the public exigencies require it," by necessary implication prohibits the taking of private property for private purposes by legislative action.

If the use of the exigency for which property is taken is public, the determination of the legislature that the necessity of so taking it exists, is conclusive. *Spring v. Russell*, 7 Greenl. 273.

As private property can only be taken without the consent of the owner for public uses, and upon the payment of a just compensation and the existence of a public exigency requiring it to be so taken, it becomes important to consider whether the legislature are the final and conclusive judges of the existence of the public use, for which private property is authorized to be taken under the constitution. "The provision in the constitution that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that where it is appropriated to public uses he shall receive a just compensation therefor, necessarily implies," observes BIGELOW, C. J., in *Talbot v. Hudson*, 16 Gray, 421, "that it can be taken only by such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals." In this view, it is a direct and positive limitation upon the exercise of legislative power, and an act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should, by statute, take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, when this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. But the legislature have no power to determine finally upon the extent of their authority over private rights. This is a power in its nature essentially judicial, which they are, by article 30 of the Declaration of Rights, expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits of the constitution, must be determined by the judiciary. In no other way can the rights of the citizen be protected when they are invaded by legislative acts which go beyond the limitations imposed by the constitution. In *Tyler v. Beacher*, 44 Vt. 648 (S. C.); 8 Am. Rep. 398, the principle under discussion was considered by the court, and Mr. Justice WHEELER, in delivering the opinion of the court, uses the following language. "Wherever the use is public, the legislature has full power to deter-

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mine whether a necessity for taking for such use in any class of cases exists or not. *Williams v. School District*, 33 Vt. 271. And the legislature has the sole prerogative of determining as to the propriety of exercising the power it has upon the necessity that does exist in any class of cases. But the legislature has not the power to so determine that a use is a public use as to make the determination conclusive. The attempt, therefore, of the legislature, to exercise the right of eminent domain, does not settle that it has the right; but the existence of the right in the legislature, in any class of cases, is left to be determined under the constitution by the courts."

In delivering the opinion of the court in *Concord Railroad v. Greely*, 17 N. H. 47, GILCHRIST, J., in referring to a provision of the constitution of New Hampshire, similar to that of this State on this subject, uses the following language: "The words are very comprehensive. It may include a multitude of objects. Their construction is a matter of judicial decision, because, however decided may be the opinion of the legislature that property in a given case has been taken for a public use, still, whenever the question arises whether it has been taken, within the meaning of the constitution, it becomes our duty to determine it. The opinion of the legislature is not final upon this, more than upon any other point, when claims cognizable in this court depend upon the question whether or not an act of that body is or is not in conflict with the constitution. Thus, even if the legislature should declare that an act taking the property of A and giving it to B as his private property was an application of it to public uses, no one would contend that such a declaration made that public which, in its nature and object, was private." It is obvious, if the determination of the legislature that the purpose for which private property is taken is for a public use, and that the necessity for so taking it exists, is conclusive, that all property is held subject to its uncontrolled will. But such it seems is not regarded to be the law; but it is for the court to determine whether the use for which property is taken is or is not public.

But to constitute a public use that will justify the taking of private property under the constitution, it is not essential that all portions of the community should derive equal benefit from the purpose for which the property is taken. It may be taken though only portions of the community are thereby benefited.

The line of demarcation between the case when property is taken

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for public, and when taken for private purposes, may not always be easily determined. But, in the case before us, the removal by the owners of their mill, and the business connected with it, from one town to another, cannot, under the most liberal construction, be deemed other than a private matter. It may be a loss to one town and a gain to another, but the removal is for the private gain of the persons moving. It is in no respect other than the moving of one business man, with his implements of business, from one place to another.

Neither can it be deemed a public use to raise money from all the inhabitants of a town to be given, or to be loaned to one of its number, to be used by him for his individual gain.

The very object of the provisions of the statute, under and by virtue of which this bill is brought, was to prevent the misappropriation of the funds of a town when collected, or to prohibit the issuing of bonds hereafter to be paid from the moneys of the same when collected.

But even if the moving of a new saw-mill from one town to another adjacent, or the building of a new grist-mill, the moving being for the benefit of the owners of the mill, and the building of the grist-mill for the benefit of the builders, or the giving and loaning money to produce such results for such purpose, were by some strange perversion of language from its ordinary acceptation to be deemed a public use, though the public have no more right to use it than they have any other property of individuals; and if by strength of imagination a public exigency could be perceived in making such change of location and such new erection, or in giving or loaning for such purposes, and a just compensation could be found when there is or may be none whatever, and it were to be deemed a just protection of property that a majority might loan the property of a minority, or incumber it with debts for private objects against the will and protestation of such minority, still the complainants are entitled to have the injunction heretofore granted made perpetual. The legislature have not said that the removal of the new saw-mill of Messrs. Hutchins & Lane, or their building a grist-mill with one run of stones is for the "public use," or is required by any public exigency, but many things may be for the "benefit" of Jay, and not for public use. Many things may be for the "benefit" of the people of the State, which are not required by any existing "public exigency." All the legislature seems to have deter-

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mined is that Jay affords a better site for the saw-mill and grist-mill of Messrs. Hutchins & Lane than the one occupied by them in the town of Livermore.

The constitution of the State is its paramount and binding law. The acquisition, possession, and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned, would be to withdraw it from the protection of the constitution and submit it to the will of an irresponsible majority. It would be the robbery and spoliation of those whose estates, in whole or in part, are thus confiscated. No surer or more effectual method could be devised to deter from accumulation — to diminish capital, to render property insecure, and thus to paralyze industry.

Injunction made perpetual.

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(80 Me. 105.)

Sale — between husband and wife. Delivery.

A husband, for a good consideration, conveyed cattle to his wife by an absolute bill of sale which he delivered to her. The cattle were at the time upon the husband's farm where both he and the wife resided. No other delivery of the cattle was made, and they remained and were used upon the farm as before. The cattle having afterward been attached on a writ against the husband, *held*, in replevin by the wife, that there was no sufficient delivery of the cattle from the husband to the wife.

REPLEVIN by Eliza J. McKee for two cows and one calf which the defendant, as deputy sheriff, had attached on a writ against Simeon Nichols and John McKee, the latter being the husband of the plaintiff in this action.

The case showed that the cattle replevied, with others, were purchased by the plaintiff's husband with money which the plaintiff lent him for that purpose from her own earnings before her marriage, which took place in 1864. That the plaintiff resided with

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her husband on the farm where all the cattle were kept and used. That some three months prior to the attachment, the plaintiff's husband conveyed the cattle to her by an absolute bill of sale under seal, for the purpose of repaying her for the money she had let him have. That said bill of sale was delivered by him to the plaintiff, at its date, and has been retained by her ever since. That no other delivery of the cattle was made, but they remained and were used upon the farm as before. That on the day the cattle were attached, but before the attachment, the husband informed the officer that the cattle belonged to his wife.

The case was withdrawn from the jury and submitted to the presiding justice, reserving right of exceptions, who gave judgment for the defendant upon the ground that there was no sufficient delivery of the cattle from John McKee to the plaintiff, whereupon the plaintiff alleged exceptions.

Asa P. Moore, for plaintiff, cited Story on Sales, §§ 353, 362; *Ludwig v. Fuller*, 17 Me. 162; *Bethel S. M. Co. v. Brown*, 57 id. 18; Story on Sales, § 312, *b*; *Stinson v. Clark*, 6 Allen, 340; Story on Sales, § 298, *a*; *Shurtleff v. Willard*, 19 Pick. 210; *Macomber v. Parker*, 13 id. 183; *Chapman v. Searles*, 3 id. 45; *Hotchkiss v. Hunt*, 49 Me. 213; *Means v. Williamson*, 37 id. 556, and cases cited; Story on Sales, § 312; *Beaumont v. Crane*, 14 Mass. 400; *Butterfield v. Baker*, 5 Pick. 525; *Turner v. Coolidge*, 2 Metc. 350; R. S., ch. 96, § 8; Hill. Rem. for Torts, ch. 2, § 1 (*a*), ch. 7, § 23.

William P. Frye & John B. Cotton, for defendant.

DICKERSON, J. The rule of law is well established that in order to pass the title to personal property by a sale, as against subsequently attaching creditors of the vendor without notice, there must be a delivery, actual, constructive, or symbolical. *Cobb v. Haskell*, 14 Metc. 303; *Burge v. Cone*, 6 Allen, 413.

What amounts to proof of delivery has been much discussed by courts and jurists, and where so much depends upon the nature of the subject-matter of the sale, its situation and condition, the usual course of trade, and all the other attendant circumstances, together with the subsequent acts of the parties as showing their intention at the time of the sale, it will be found exceedingly difficult, if not absolutely impracticable, to lay down a general rule applicable to all cases.

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Though this is undoubtedly true, yet it is proper to observe, in general terms, that to constitute proof of a delivery, there must be such evidence arising from the conduct of the parties as shows a relinquishment of ownership and possession of the property by the vendor, and an assumption of these by the vendee. This is the case :

1. Actually; when there has been a formal tradition of the property to the vendee ; or,

2. Constructively, when the property not being present or accessible, as a ship at sea, the vendor gives the vendee a grand bill of sale, under which he takes possession upon her arrival in port ; or, if the property is difficult of access, as logs in a stream, or incapable of manual tradition, as large blocks of stone, when the vendor approaches in view of it, with the vendee, and proclaims a delivery to him ; or, when a part of the goods are delivered for the whole ; or, if the goods are in the custody of a third party, where the parties to the sale give such party notice of the transfer ; or,

3. Symbolically, when the vendor gives the vendee the key to the warehouse in which the goods are stored, or an order on the wharfinger, or warehouse-keeper who has them in charge, or a duplicate invoice of a ship's cargo, authenticated by the master, or a bill of lading duly indorsed.

Though the assignment and delivery to the vendee by the vendor of a bill of lading, invoice, or other documentary evidence of his title to the goods has been held good, as a symbolical delivery, the delivery of a bill of parcels or bill of sale by the vendor to the vendee has been held insufficient, as these depend solely upon the vendor for their authenticity, and may be multiplied indefinitely ; such memoranda are not, technically considered, documentary evidence of the vendor's title.

Thus in *Landfear v. Sumner*, 17 Mass. 117, a merchant in Philadelphia made out and receipted a bill of sale of a number of chests of tea, supposed to be on their passage from China to Boston, though they were then in the custom house in Boston, and before the agent of the vendee demanded possession of them they were attached by the creditor of the vendor. The court sustained the action on the ground that the goods not being at sea there was no delivery, actual or symbolical, before the attachment.

So in *Carter v. Willard*, 19 Pick. 9, the only evidence of delivery was the giving of a bill of sale of the goods by the vendor to the

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vendee, and the court held that that was not sufficient. So, also, in *Burge v. Cone*, 6 Allen, 413, the same question arose with the same result.

The doctrine of delivery rests upon the ground that the vendee should have the entire control of the property, and that there should be some notoriety attending the act of sale; and hence, proof of delivery will not be dispensed with on account of the peculiar situation or relations of the parties with respect to the property at the time of the sale, nor will these constitute sufficient evidence of delivery.

Accordingly it has been held to be no proof of delivery, that the vendor and vendee reside in the same house, *Trovers v. Ramsy*, 3 Cranch, 354; not even if they are brothers, *Haffron v. Clark*, 5 Whart. 445; or son-in-law and father-in-law, *Stulwagon v. Jeffries*, 44 Penn. 407; nor if the vendor resides with the vendee, *Halle v. Cralle*, 8 B. Monroe, 11; nor when the vendor's agent remains in possession with the vendor, *Medell v. Smith*, 8 Cowp. 333; nor though the parties are partners with respect to the property sold, *Shurtleff v. Willard*, 18 Pick. 201.

It is clear from these cases that there is the same necessity of a delivery, when the parties to the sale are husband and wife, that there is in other cases. For this purpose the wife sustains the same relation to the husband as any other person; and though, in respect to personal property owned by the wife in her own right, she stands upon the same footing that her husband does to his, we are not aware that the authorities have yet gone so far as to dispense with the necessary formalities to be observed in acquiring property in her favor. *Hanson v. Millett*, 55 Me. 189.

In this case there was no actual delivery. John McKee, the vendor, and husband of the plaintiff, held the same possession after as before the sale of the cattle. There was no change of possession by the act of sale. The plaintiff had no possession either of the cattle or the farm on which they were kept. She resided on the farm simply because her husband did. Nor was there any constructive or symbolical delivery, unless the delivery of the bill of sale constituted one; and that, as we have seen, is not sufficient, there being nothing to prevent an actual delivery by a transfer of the manual possession of the property to the vendee.

Notice of the sale to the officer holding the writ, before service,

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uncommunicated to the creditor, is not notice to him. *Stanly v. Peasley*, 5 Me. 369.

The adjudication of the presiding judge in giving judgment for the defendant was in strict accordance with the law of the case.

Exceptions overruled.

ELLIS V. BUZZELL.

(60 Me. 202.)

Slander — justification — burden of proof.

ACTION for slander in charging the plaintiff with the crime of adultery. **Plea**, that the words were true. **Held**, that a preponderance of evidence would support the plea, and that the defendant was not bound to prove the plea beyond a reasonable doubt as on indictment for crime.

ACTION on the case for slander, alleging that the defendant falsely charged the plaintiff with the crime of adultery. **Plea**, that the words were true. The verdict was for the defendant, and the plaintiff alleged exceptions.

Lebroke & Pratt, for plaintiff. In civil cases, where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, the crime charged must be proved beyond a reasonable doubt before the plaintiff is entitled to a verdict; but where no such issue is raised by the pleadings, the jury may decide upon the preponderance of evidence. 2 Greenl. on Ev., § 408; *Thayer v. Boyle*, 30 Me. 475; *Sinclair v. Jackson*, 47 id. 102; 2 Greenl. on Ev., § 426; *Mitchell v. Borden*, 8 Wend. 570; *Woodbeek v. Keller*, 6 Cowp. 118; *Clark v. Debble*, 16 Wend. 601; *Hopkins v. Smith*, 3 Barb. 599; *Steinman v. McWilliams*, 6 Barr, 170; *Grimes v. Coyle*, 6 B. Monr. 301; *Wonderly v. Nokes*, 8 Blackf. 589; *Gorman v. Sutton*, 32 Penn. St. 273; *Forshee v. Abrams*, 2 Clarke, 571; *Newbit v. Statuck*, 35 Me. 313.

J. A. Peters and *F. A. Wilson*, for defendant.

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BARROWS, J. The plaintiff claims to recover damages of the defendant, because, he says, the defendant falsely charged him with the commission of the crime of adultery.

The defendant says the plaintiff ought not to recover damages, because the accusation was not false, but true, and he testified that he saw the plaintiff in the act of adultery with a certain woman. The plaintiff denies this in his testimony, and produces the deposition of the woman, who denies it also. Hereupon he requests the judge to instruct the jury that the defendant, in order to maintain the defense, must prove the act of adultery upon him beyond a reasonable doubt, the same as if he was on trial for the commission of the crime.

The judge refused so to instruct, and, on the contrary, instructed the jury that if the defendant had made out the truth of the charge against the plaintiff by a preponderance of testimony, it was sufficient to entitle him to a verdict; and that proof of the truth of the statements made by the defendant would be a complete justification for uttering them.

In suits to recover damages for what is alleged to have been slander, the truth of the charges made by the defendant against the plaintiff has always been deemed a sufficient justification, even though they were maliciously made. We see this in the form and tenor of the plea in justification which simply asserts the truth of the words spoken. Went. Pl., vol. 3, p. 236; Chit. Pl., vol. 3, p. 525; *Foss v. Hildreth*, 10 Allen, 76.

Unless the charge made by the defendant against the plaintiff was false, as well as malicious, the plaintiff has no right to recover damages from him. The falsehood of the charge is a necessary element in the plaintiff's case. He cannot complain of any one for speaking of him nothing but the truth.

The burden, however, of proving that what he has said is true rests rightfully enough upon the defendant, not only because he holds the affirmative according to the pleadings, but because of the presumption of innocence. This presumption, as well as whatever testimony the plaintiff may offer to repel the charge, the defendant must be prepared to overcome by evidence.

But when he has done this by that measure and quantity of evidence which is ordinarily held sufficient to entitle a party upon whom the burden of proof rests, to a verdict in his favor in a civil case shall he be required to go further, and in order to save him-

presumption of innocence; for as was justly suggested by WALTON, J., in *Knowles v. Scribner*, 57 Me. 497 (where we held the complainant in a bastardy process against a married man not bound to furnish the same amount of proof of the defendant's guilt, as would be necessary to convict him if he were on trial for adultery, in order to entitle herself to a verdict and contribution from the father of her bastard child), "it is more accurate to say that there is no preponderance unless the evidence is sufficient to overcome the opposing presumptions as well as the opposing evidence."

If the words said to be slanderous impute to the plaintiff the commission of a crime, the defendant must fasten upon the plaintiff all the elements of the crime, both in act and intent, and to do this he must furnish evidence enough to overcome, in the minds of the jury, the natural presumption of innocence, as well as the opposing testimony. But to go further, and say that this shall be done by such a degree and quantity of proof as shall suffice to remove from their minds every reasonable doubt that might be suggested, is to import into the trial of civil causes between party and party a rule which is appropriate only in the trial of an issue between the State and a person charged with crime and exposed to penal consequences if the verdict is against him.

The doctrine contended for by the plaintiff did not prevail in the courts of New Hampshire or North Carolina. *Matthews v. Huntley*, 9 N. H. 150, per PARKER, C. J.; *Folsom v. Brawn*, 5 Foster, 122; *Kincade v. Bradshaw*, 3 Hawks. 63.

It is worthy of remark, that, with a very few unimportant exceptions, the cases in which it has been held, that to sustain a plea of justification the defendant in an action of slander must adduce such proof as would suffice for the conviction of the plaintiff upon an indictment, have been cases in which words used imputed perjury to the plaintiff, and in most of them, the matter more directly under consideration has been the propriety of regarding the plaintiff's testimony upon the occasion referred to, as evidence in the case, to be overcome by the production of more than one witness to prove its falsity — the necessity of showing that his testimony was false in intent as well as in fact — its materiality or some point affecting the truth of the charge, and not the necessity of proving the commission of the crime beyond a reasonable doubt.

We have no occasion to question those decisions so far as they enforce the necessity of proving all the elements necessary to con

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stitute the crime charged by an amount of evidence sufficient to overbalance the plaintiff's side of the case.

It may be, and probably is, true that the compendious phrase, "sufficient to convict the plaintiff upon an indictment," has had reference more frequently to the matters which it was necessary to establish than to the degree of assurance upon which the jury should act.

In our own case of *Newbit v. Shattuck*, 35 Me. 318, the consideration of the precise question here raised was studiously and expressly avoided.

Exceptions overruled.

 STATE V. HUSSEY.

(60 Me. 411.)

Criminal law. Indictment — "willfully and maliciously."

The statute made the "willfully and maliciously" doing of a certain act criminal. An indictment, under the statute, charged that the defendant did the act "unlawfully and maliciously." *Held*, that the indictment was bad.

APPLETON, C. J. The R. S. of 1871, ch. 127, § 7, provide, among other things, for the punishment of "willfully and maliciously" throwing down a gate.

The allegation in the indictment is that the defendant "did unlawfully and maliciously throw down a certain gate," etc.

These words do not describe the statute offense. The indictment should charge the offense in the words of the statute, or in words equivalent thereto. The statute uses the words "willfully and maliciously." It does not regard them as identical in meaning, as both are used. When the statute makes the doing of an act "willfully and maliciously" criminal, it will not be sufficient in the indictment to charge that it was done "feloniously, unlawfully, and willfully." *State v. Gove*, 34 N. H. 511. So, charging an offense to have been committed "feloniously, voluntarily, and maliciously," instead of "feloniously, unlawfully, and maliciously," is bad. *Res v. Reader*, 19 E. C. L. 367. Unlawfully doing a thing is not synony-

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mons with willfully doing it. A man may do many things willfully which are not unlawful, and he may do things unlawfully which are not willfully done.

It was held in *Rex v. Davis*, 1 Leach, 556, that "unlawfully and maliciously" is not equivalent to "willfully and maliciously," and that as "willfully and maliciously" were both mentioned in the statute as descriptive of the offense, both must be stated in the indictment.

Exceptions sustained.

TAPLEY, J., dissented.

T. B. Reed, Att'y-Gen'l, for the State.

E. F. Webb, for defendant.

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(60 Me. 503.)

Lord's day.

An action on the case for injuries to plaintiff's horse by reason of the defendant's neglect and careless driving during a pleasure drive on Sunday, for which he was hired, held not maintainable. (See note, p. 512.)

CASE in tort to recover damages to the plaintiff's horse and carriage, by reason of the careless, negligent and unskillful driving of the defendant, while in possession of them under a contract for a pleasure drive on Sunday, to the Atlantic House, Scarborough, the injury complained of having occurred on Sunday during such drive.

The defendant claimed, as matter of law, that the plaintiff could not recover upon proof of all the facts alleged, because the damages resulted from the letting of the horse on Sunday.

The parties submitted the case to the full court.

S. C. Strout and *H. W. Gage*, for plaintiff.

Howard & Cleaves, for defendant.

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APPLETON, C. J. This is an action of the case to recover damages for injuries to the plaintiff's horse and carriage, arising from the defendant's negligent and careless driving.

The plaintiff let his horse and carriage to the defendant, on Sunday, for a pleasure drive to the Atlantic House in Scarborough. The injuries complained of arose during such drive.

A contract made on Sunday, for hiring horses on a pleasure excursion on that day, is void. *Berrill v. Smith*, 2 Miles, 402. A person traveling on the Lord's day, neither from necessity nor charity, cannot maintain an action against a town for an injury received by him while so traveling, by reason of a defect in a highway, which the town is bound to keep in repair. *Bosworth v. Swansea*, 10 Metc. 363; *Hinckley v. Penobscot*, 42 Me. 90.

The case finds that the contract between the parties was one of bailment. The defendant's possession was under and by virtue of such contract. His liability arose under it. His possession was obtained by virtue of it. As a bailee the defendant was bound to pay the stipulated price for the use of the property loaned, and to use it with ordinary care and diligence. In case of a negligent or careless use thereof he would be liable upon his contract for the damages arising from such negligence and carelessness. Such is the general rule. But in this case the contract was illegal. Had the plaintiff sued for the hire of the articles loaned he could not have recovered. Suing for damages arising from the violation of his contract he can be in no better condition. The defendant could not have recovered against the town for any injuries arising from defects in the highway, because he was traveling in violation of law. If he could not against the town, much more cannot the plaintiff recover against him, inasmuch as he was a party to the illegal contract, by which the defendant had possession of the horse and carriage.

It is said that the case, as charged in the declaration, is one of simple wrong, outside of and independent of any contract. That may be so, but it does not affect the question, when the facts are shown, for it appears from the report that the defendant was not "in the lawful possession of the plaintiff's horse and carriage," but, on the contrary, he was in possession of the same by virtue of a contract made in violation of law.

In *Woodman v. Hubbard*, 5 Foster, 67, and in *Morton v. Gloster*, 46 Me. 520, the contract between the parties was at an end. The suits were for the conversion of the property bailed after the bail-

ment had terminated. They were for acts after the expiration of the hiring. Here, the injury arose during the continuance of the bailment, and in carrying out the very purpose for which the property injured was bailed. The bailee of a horse and carriage, for a pleasure drive on the Lord's day, by his careless and negligent driving, injures the property bailed. It matters not whether the fact is proved by the one side or the other; being proved, the legal result of the fact must follow.

If the contract had been a valid contract, the defendant would have been liable upon the implied promise to use ordinary and common care of the property bailed, which the case finds he did not. Being a contract illegal and void his liability upon the contract is at an end. There is nothing done, or proved to be done, outside of the contract. The negligent and careless acts complained of are admitted to have been done during the drive and during the contract of bailment.

Plaintiff nonsuit.

DICKERSON, J., dissented.

NOTE. — See *Hall v. Corcoran*, 9 Am. Rep. 30, wherein the supreme judicial court of Massachusetts held that the owner of a horse, which he had let to be driven for pleasure on a Sunday to a particular place, could maintain tort for the conversion of the horse, where the hirer drove it to a different place, and in doing so injured it. See, also, *Myers v. Meinrath*, 3 Am. Rep. 368, wherein the authorities, as to contracts, etc., made on Sunday are collected. — RHP.

HOLBROOK V. CONNOR.

(60 Me. 575.)

Deceit—fraudulent misrepresentations as to value.

Fraudulent misrepresentations of a vendor of real estate as to the price which he paid therefor are not actionable. (See note, p. 218.)

ACTION on the case for deceit in the sale of land. The plaintiff alleged that he was induced to enter into a joint-stock company and to subscribe for and buy the lands in question by the false and fraudulent representations of the defendant, the vendor, "that the said lands had large deposits of oil in them, and were of great

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value for the purposes of digging, boring for, and manufacturing oil; and that said Lancey and said Connor had actually paid the sum of \$14,000 therefor."

There was testimony tending to prove that these representations were false and fraudulent, and that the defendants actually paid a much less sum for the land thus sold.

The remainder of the case sufficiently appears in the opinion.

The verdict was for the plaintiff.

D. D. Stewart, for plaintiff.

A. Libbey and *G. W. Whitney*, for defendants.

DANFORTH, J. The declaration in the writ in this case, after some preliminary allegations, sets out that the plaintiff, "relying upon the aforesaid representations of the said defendants, that said lands had large deposits of oil in them, and were of great value for the purposes of digging, boring for, and manufacturing oil, and that said Lancey and said Connor had actually paid the sum of \$14,000 therefor, was induced to enter into a joint-stock company with other persons, and to subscribe for and buy of said defendants, twenty shares in said alleged oil lands and oil well, and for which he then and there paid the sum of five hundred dollars in money." That these representations were false, and were fraudulently made is also alleged. Upon these two allegations the plaintiff's action rests, and if neither of them, or the testimony offered to prove them is sufficient to sustain the suit it must fail.

In regard to the first allegation, "that the lands had large deposits of oil in them," etc., it is contended that the instruction to the jury is erroneous, inasmuch as it was left to them to find whether the statement was understood as a matter of opinion or the representation of a fact as with the knowledge of the defendants. It is not claimed that the law as given is incorrect, but that it is not applicable to the case as proved. This objection, we think, rests upon a valid basis.

It is true that the language of the beginning of the allegation is the statement of a fact. It is a fact, however, which, unconnected with the other part of the sentence, is of but little consequence. For the lands were sold and purchased for the purpose of making profit in obtaining oil from them.

Assuming, then, that they had large deposits of oil, we have made but little progress in ascertaining their value for the purpose of "digging, boring for, and manufacturing oil." This would depend very materially upon the facilities of getting to the lands, the expense of sinking wells, getting the oil to market, and many other things affecting the costs of production and the market price of the oil.

The whole sentence, then, seems to be but the expression of an opinion that the land is valuable for the purposes indicated, containing but one fact out of many upon which a correct judgment must be founded. It is but an opinion of the value or quality of the land. On recurring to the testimony we find that the statement was and must necessarily have been only an opinion, and was taken as such by the plaintiff. It was in proof that up to the time of the trial, the lands had not been tested, and it was entirely unknown to both parties whether the land was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and the single well upon the land in question.

The plaintiff himself testified that Connor, one of the defendants, "said the fifty acres was good oil land, and pointed to these wells not a great way off in proof of his statement."

On cross-examination he says, "I understood the two hundred acres had not been tested, and that operations upon it might be unsuccessful. I understood I was making a speculation which might be unsuccessful. * * * I expected to suffer loss if we did not find oil, or if oil went down." This, corroborated by other testimony and uncontradicted, shows conclusively that the statement was made and understood as a matter of opinion. It may be true that the statements made in relation to the neighboring wells in support of this opinion were false and fraudulent, but that is not the fraud complained of in this action. It is clear that the verdict cannot be sustained under this allegation. Even if sufficient in other respects there is no testimony to show the falsehood of the allegation, so far certainly as it refers to the deposits of oil. On the other hand, the case shows that up to the trial the land had not been tested, and for aught that appears there may be oil enough in it to supply the world for an indefinite period.

The only other allegation on which the plaintiff rests his action is that which relates to the price paid for the land.

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We think that such a statement, though false, is not sufficient to sustain an action.

It was early decided that no action would lie against a man for falsely declaring that a third person would have given him so much for his land. Roberts on Frauds, 524, and cases cited.

This was recognized as good law in *Cross v. Peters*, 1 Me. 389, and, so far as we are aware, has never since been questioned.

In *Medbury v. Watson*, 6 Metc. 246-260, it was held that a false statement by a third person as to what the owner paid, is actionable. But in the same case, in the opinion, on p. 259, it is said that "in regard to affirmations and representations respecting real estate, the maxim of *caveat emptor* has ever been held to apply. When, therefore, a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it, such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable."

In *Hemmer v. Cooper*, 8 Allen, 334, in the opinion, it is said, "The representations of a vendor of real estate to the vendee, as to the price paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that, even when they are false, and uttered with a view to deceive, they furnish no ground of action." And that was the only point raised in the case.

In *Manning v. Albee*, 11 Allen, 522, GRAY, J., says, "This court has repeatedly recognized and acted upon the rule of common law, by which the mere statements of the vendor, either of real or personal property, not being in the form of a warranty, as to its value, or the price which he has given, or been offered for it, are assumed to be so commonly made by those holding property for sale, in order to enhance its price, that any purchaser who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive."

As late as *Cooper v. Lovering*, 106 Mass. on p. 79, AMES, J., in the opinion, says, "It has been repeatedly decided that representations of a vendor, as to the value or cost of the property to be sold, or as to offers for it made by others, even though false, are not representations upon which a purchaser ought to rely, and are not sufficient to furnish any ground of action."

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In *Mooney v. Miller*, 102 Mass. 220, the same doctrine is recognized.

The same doctrine has been held in our own State, so far as the question has been discussed.

In *Long v. Woodman*, 58 Me. 52, *Hemmer v. Cooper* is recognized as good law, and the principle is still more fully discussed in *Martin v. Jordan*, 60 id. 531.

In a late English work of good authority, representations by the vendor, as to price paid by him for land, are regarded in the same light as representations respecting its value, or the offers which have been made for it. It is there said, "a purchaser is not justified in placing confidence on them." Kerr on Fraud and Mistake, 88.

This view seems to have been considered as well-settled law by all the authorities bearing upon the question, so far as we have been able to ascertain, with the exception of *Sanford v. Handy*, 23 Wend. 260, and *Van Epps v. Harrison*, 5 Hill. 63. In the latter of these cases, BRONSON, J., says: "In *Sanford v. Handy* it was intimated that a vendor would be liable for misrepresentations as to cost, but the point was not decided." He then states his own convictions as decidedly the other way; and after giving his reasons for his own views with much force, he closes by saying, "the majority of the court think otherwise."

This case, decided by a bare majority, with the reasons given all against the decision, is the only case directly in point in conflict with the authorities before cited.

The other cases cited in the argument for the plaintiff are decided upon different principles, and are not in conflict with those relied upon in defense. Some of them were decided on the ground that a confidential relation existed between the vendor and vendee. This was the case in *Bagshaw v. Seymour*, 93 Eng. Com. Law, 873, and *Clarke v. Dickson*, 95 id. 452, where the defendants acted in behalf of and as agents for the plaintiffs. In *Bradley v. Poole*, 98 Mass. 169, and many of the cases cited, the representations were as to the condition of the company and the amount actually paid in, facts upon which the value of the shares sold materially depended. Other cases rest upon statements of the amount paid for bonds in the market, or rents actually paid for lands under lease, showing the actual market value of the property sold. All these cases are widely distinguishable from the one at bar. What a person may have paid for land is one thing, its actual market value another, and often a

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very different thing. The purchaser of land for a company, though not especially appointed as agent therefor, would not be permitted to deceive, or even make a profit out of those for whom he assumed to act, and who subsequently adopt or ratify what he has done. In the case at bar the defendants, in making the purchase of the land, were not the agents of the association, nor did they assume to act for or in their behalf. The purchase was made before the company was formed, and, so far as appears, before its organization was contemplated. The contract of the parties does not refer to the original purchase. So far as the land is referred to, it provides simply for a sale, which is completed by a deed subsequently given. True, it was sold for the purpose of forming a joint-stock company, of which the defendants were to be members; still it was but a sale, and the parties to this case stand to each other in the relation of grantor and grantee, and no other, and in the writ are so declared to be. Viewing the authorities, then, as bearing upon the admitted facts of this case, they would seem to be nearly all one way, very clearly showing that a false representation by the vendor, of the price paid for land, will not lay the foundation for an action. And if we add to these the long list of cases in which it has uniformly been held that misrepresentations as to value and quality, and even of offers made by third persons, though fraudulent, are not actionable, it would seem that the law upon the question we are now considering must be free from doubt. If we examine the question upon principle, the result must be the same. The statement of the vendor, that he paid a certain price for his land, if true, can be no more than an indication of his opinion of its value; and when we consider the various motives which may, and often do actuate men in making their purchases, and especially when it is done for the purposes of speculation, it is but the slightest proof of such an opinion. It is certainly of no more value than the offer of a third person, and this is considered of so little worth that it is not legal testimony in a case where the market price is in issue.

It is, however, claimed that the price paid is a definite fact, the truth or falsity of which is susceptible of satisfactory proof, while assertions of quality and value are necessarily matters of opinion which are too uncertain for judicial cognizance. This may be true, and the same may be said of offers made as well as many other representations not actionable. But it should also be remembered, that a misrepresentation, to be the foundation of an action, must

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relate, not only to an existing fact, but to a material one; one which will enable the purchaser more intelligently to form his own opinion of the value of the property. Now, as we have already seen, the price paid, if correctly stated, is but an uncertain indication of the vendor's opinion. It gives no light whatever as to any inherent fixed quality, or description which goes to make up the value, and, in this respect, is not distinguishable from an offer made, except that it is even more unreliable, as an indication of value. The instructions of the presiding justice not being in conformity with these views, and being inapplicable to the case as presented by the testimony, the exceptions must be sustained, and it is unnecessary to consider the various other points raised.

DICKINSON, J., delivered a dissenting opinion, in which KENT, J., concurred.

Exceptions sustained.

NOTE.—In *Stinar v. Canaday*, 53 N. Y. 298, which was an action to recover damages for an alleged fraud on the part of the defendant, practiced to induce the plaintiff to take certain bonds and mortgages, alleged to be worthless, in part payment for property conveyed to defendant, it was contended by defendant that the statements as to the value of the land covered by the mortgage and of the mortgages were mere matter of opinion and not actionable. The court said: "If they were such, no liability is created by the utterance of them; but all statements as to value of property sold are not such. They may be, under certain circumstances, affirmations of fact. When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them and is misled to his injury they avoid the contract. (*Stebbins v. Eddy*, 4 Mason, 414-423.) And where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damage sustained. *Medbury v. Watson*, 6 Metc. 246, and see *McClellan v. Scott*, 24 Wis. 81." The court also said: "Whether the representation as to the value is merely an expression of opinion or belief, or an affirmation of a fact to be relied upon, is a question for the jury."

But in *Ellis v. Andrews*, 9 Alb. Law Jour. 262, the same court held that a false statement as to the value of stocks, made by a vendor while negotiating a sale thereof and for the purpose of obtaining a higher price than he knew they were worth, does not give the purchaser, relying thereon, a cause of action for the deceit. The stocks, in that case, were of the Congress and Empire Springs company at Saratoga, and were not quoted in the market. It was alleged that the defendant fraudulently stated to the plaintiff, a woman, that the stock was worth at least eighty per cent of the par value, and that relying on that statement she purchased. The stock was in fact worth only forty per cent. GROVER, J., who delivered the judgment of the court, said that the assertion of the defendant as to the value could not be regarded as the expression of an opinion as to its value, but that it "must be regarded as a false statement of the value, made for the purpose of obtaining a higher price for the stock than they knew it was worth." On the authority of *Harvey v. Young*, Yelverton's Reports, 21, the court held that an action would not lie. The court said: "Upon the question of value the purchaser must rely upon his own judgment, and it is his folly to rely upon the representations of the vendor in that respect, but in regard to any extrinsic fact affecting the quality or value of the subject of the contract he may rely upon the assurances of the vendor, and if he does so rely, and the assurances are fraudulently made to induce him to make the contract, he may have an action for the injury sustained. * * * Had the complaint stated that the defendants upon the sale made false and fraudulent statements to the plaintiff in relation to the property owned by the corporation, its business, pecuniary condition, the price at which its stock was selling in the market, or any other fact affecting its value with intent to deceive and defraud her, that she in reliance thereon had made the purchase, and been thereby injured, it would have shown a good cause of action. *Hubbell v. Meigs*, 50 N. Y. 480. As to such matters, a purchaser has a right to rely upon the statements of the vendor, but not upon his mere statements of the value. As to the latter, he must rely upon his own judgment, and if not sufficiently informed, must seek further information."

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

ATLAS BANK V. DOYLE

(9 R. I. 76.)

Promissory note — pledge — burden of proof.

A pledgee of negotiable paper has generally a right to collect the whole amount of securities pledged to him, and account to the pledgor for the surplus over his debt. But in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgor. The holder of commercial paper is presumed to be a holder for value, until the contrary is shown; and, by presenting such paper, he makes a *prima facie* case, sufficient to justify a verdict for him, if the defendant does not rebut it. But if the defendant does produce evidence to rebut this presumption, the burden is still on the plaintiff, taking all the testimony together, to show a valuable consideration by a preponderance of proof on his side. If, however, the defendant, not disputing the original consideration, takes some new ground of defense, as payment, failure of consideration, etc., then the burden is on him to prove this matter of avoidance.

ASSUMPSIT on the check of the defendant on D. W. Vaughan & Company for two thousand dollars, payable to bearer, and dated June 17, 1867. At the trial of the case before Mr. Justice POTTER, with a jury, the plaintiffs produced the check in suit and there rested their case. The defendant then called Thomas H. Brownell,

who testified that he was cashier of the Atlas Bank during the year 1867, and, as such cashier, received the check in suit from Edward J. Cushing as collateral security toward Cushing's indebtedness to the bank, and that he paid out no money on the check. On being asked, in cross-examination, if the check of Edward J. Cushing, dated June 18, 1867, for two thousand dollars on the Atlas Bank, was not paid on account of the check in suit, he replied that it was not.

The defendant's counsel then moved that the case be sent to an auditor to ascertain the state of the account between Cushing and the bank, claiming that the check in suit having been loaned by the defendant to Cushing without consideration, and by said Cushing pledged to the plaintiffs as collateral security for his indebtedness to them, the plaintiffs could not maintain this action without proof of such indebtedness.

This motion the judge overruled, and instructed the jury that the plaintiffs might maintain their action and recover upon the money counts in their declaration, without reference to the question whether Cushing was or was not indebted to the plaintiffs. Under these instructions, the jury having returned a verdict for the plaintiffs for \$2,106.00, the amount of the check and interest, the defendant now moved for a new trial upon the ground of error in law in said instruction.

Payne, for the motion.

Thurston, Ripley & Company, against it.

POTTER, J. Of the general right of the pledgee to collect notes and securities pledged to him, there can be no doubt. If he could collect only the amount for which the paper was pledged, this would render two suits necessary to collect the whole amount of the note pledged. The pledgee can collect the whole, and account to the pledgor for the surplus over his debt.

But with paper known to be accommodation paper the case is different. If, in this case, the pledgee could collect the whole of the maker, he could be obliged to pay the surplus over his own claim to the pledgor, who would be in his turn liable to repay such surplus to the maker. We think, therefore, that in case of accommodation paper pledged, the pledgee can recover of the maker only

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the amount of the debt due him from the pledgor. *Jones v. Hibbert*, 2 Starkie, 304; 3 Eng. Com. Law, 356; *Chicopee Bank v. Chapin*, 8 Metc. 40; Chitty on Bills, 81; *Wiffin v. Roberts*, 1 Esp. 261.

On the trial of the case the defendant claimed that the burden of proof (it being a pledge) was on the plaintiffs to show the amount of the defendant's indebtedness; and the plaintiff, at the hearing before us, claimed that the defendant was obliged to prove that the debt for which the note was pledged as collateral, had been paid wholly or in part.

The holder of commercial paper is presumed to be a holder for value; that is, until the contrary be shown. In the present case, it was proved that the defendant's check (payable to bearer) was pledged by Cushing, to whom it was given, to the plaintiffs, for his (Cushing's) indebtedness. This shows a valuable consideration, and makes the plaintiffs holders for value, even if the indebtedness be fluctuating. Byles on Bills (side page), 122; *Heywood v. Watson*, 4 Bing. 496; Chitty on Bills (side page), 85; *Woodruff v. Hayne*, 1 C. & P. 600; 1 Starkie, 483.

It is generally sufficient for the holder of such paper to present it; and it is held to be *prima facie* evidence that he is a holder for value and to the amount expressed. The burden of proof is indeed on the plaintiff to prove a valuable consideration, but by presenting the paper he makes a *prima facie* case, that is, a case sufficient to justify a verdict for him if the defendant does not rebut it. But if the defendant does produce evidence to rebut this presumption, the burden is still on the plaintiff, taking all the testimony together, to show a valuable consideration by a preponderance of evidence on his side. *Burnham v. Allen*, 1 Gray, 500; *Delano v. Bartlett*, 6 Cush. 366 (which criticises and explains 1 Cush. 170); *Powers v. Russell*, 13 Pick. 69, 76.

But if the defendant, not disputing the original consideration, takes some new ground of defense, for example, payment, failure of consideration, and the like, then the burden is on him to prove this matter of avoidance. *Delano v. Bartlett*, *ante*; 3 Phillips on Evidence (side page), 161.

In the present case, therefore, it would be sufficient for the plaintiffs in the first instance to produce their check to the jury, which would entitle them to a verdict for the face of it, unless the defendant produced evidence to show that the amount of the indebtedness was either originally less or had been reduced by payment. If he does

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so, then, taking all the evidence together, the burden of proof would return on the plaintiffs to show themselves entitled to recover the face of the check. Chitty on Bills (side page), 638, note c.

A new trial will be granted, on the defendant's filing an affidavit that he has evidence to show that the amount of Cushing's indebtedness to the plaintiffs was less than the amount of the check.

CASE V. DENNISON.

(9 R. I. 82.)

Gift causa mortis.

A gift "*causa mortis*" cannot be sustained when there has been no delivery of the subject of the gift so claimed, although, at the time it was sought to be made, it was out of the reach of the would-be donor, so that the delivery was impossible.

TROVER and conversion by the plaintiff, as administrator on the estate of Sarah W. Dennison, late of Providence, deceased.

The declaration alleged that the plaintiff, in his capacity of administrator on the estate of the said Sarah W. Dennison, was entitled to the possession of a certain bank-book containing evidence of the deposit of money with the People's Savings Bank of Providence, marked "Ledger B, page 246." "Deposit of \$425, July 16th, 1855," being the property of the said Sarah W. Dennison in her life-time, which said book came into the hands and possession of the said defendant by finding, and that the said defendant converted the same to his own use, etc.

Plea, the general issue and issue joined.

A jury trial having been waived, the case was submitted to the court in fact and law.

The material facts upon which the decision of the case turned are sufficiently set forth in the opinion of the court.

Case, pro seipso.

W. H. Greene, for defendant.

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DURFEE, J. According to the testimony or admissions made in this case, the plaintiff's intestate was a married woman who had separated from her husband, a resident of Connecticut, and had for some time previous to her death been living with her son-in-law, Rufus B. Lawton, in Providence, R. I. In July, 1855, she came into the possession of \$425, which she gave to her said son-in-law, and told him to do with it what he saw fit. He deposited it in her name in the People's Savings Bank, in Providence, and told her what he had done, to which she replied that it was all right. The bank-book, however, did not pass into her keeping, but remained in a bureau drawer of Lawton or his wife, a daughter of the intestate, at his house in Providence. In November, 1855, the intestate died at Mystic, in Connecticut. Shortly before her death, her son, the defendant, being present, she told him she had not long to live, spoke of the bank-book being in the possession of her son-in-law, and she wanted the defendant to get it, settle the bills, and if any thing was left to divide it among her three children. She said she did not want her husband to have it. Her three children were the defendant, another son, and Mrs. Lawton. After her death the defendant obtained the book, but the bank refused to pay the deposit to him without a bond. It is admitted that the defendant had the book at and before the commencement of this action, that the plaintiff demanded it of him, and that the defendant refused to give it up, claiming to hold it as a gift *mortis causa*.

For the purposes of our decision, we deem it unnecessary to recite the testimony or admissions more at length. We think the defendant is not entitled to either the bank-book or the money which it represents, as a gift *mortis causa*. There was no delivery, and there are cases which support the view that, without a delivery, such a gift cannot be sustained, even where the subject of the gift is in possession of the donee when the gift is made. *Cutting v. Gilman*, 41 N. H. 147; *Huntington v. Gilman*, 14 Barb. 243; *Shower v. Pilck*, 4 Exch. 478. In this case the immediate donee, if we may so term the defendant, was not in possession of the bank-book when it is claimed to have been given. It is urged that the book was in the possession of Mrs. Lawton, who, it is claimed, was a donee, and that it was not where the intestate could get it to deliver, and that, upon these grounds, the gift should be sustained. But we think a delivery should not be dispensed with on such grounds. To hold otherwise would, in our opinion, trench upon the statute, and open a door

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to the class of evils which are incident to nuncupative wills. We give the plaintiff judgment.

Judgment for plaintiff, which, by agreement, was entered for nominal damages only.

HARRIS V. THE SOCIAL MANUFACTURING COMPANY.

(9 R. I. 99.)

Award — uncertainty — "freshet."

An award that the defendants have a right to keep up and maintain their dam at a certain height, and to keep thereon flush-boards twelve inches wide, at all times except in times of "freshet," *held*, bad for uncertainty, the word "freshet" so varying in its meaning as to necessitate constant litigation.

PETITION for a rehearing of the original bill between the same parties, and for leave to file a supplemental bill in the nature of a bill of review. At the September term, 1864, of this court for the county of Providence, a demurrer to the bill was sustained, and the bill dismissed with costs. The case is reported in 8 R. I. 133, and in 5 Am. Rep. 549, and the material facts of the case are there represented with sufficient fullness. Such of the reasons assigned why a rehearing should be granted as were passed upon by the court, are sufficiently set forth in their opinion granting the same.

R. W. & T. C. Greene, and B. R. Curtis, for complainant.

Currey, for respondent.

POTTER, J. This is a bill to set aside an award for uncertainty, and because it does not conform to the submission.

Disputes having arisen between the parties in relation to the defendants' dam, it was agreed to refer "their respective rights in the premises, and all questions in dispute between them in relation to said dam," to three arbitrators for final award. This agreement was entered as a rule of court, and their report, when made, was, without exceptions, confirmed by the court.

The bill alleged that the defendants had the right, by deed dated

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in 1841, to raise their solid dam to the top of a certain rock, and to keep six inch flash-boards thereon from November to April absolutely, and from April to November contingently; that in 1855, the defendants put temporary twelve inch flash-boards on said dam, taking them off when the water was high, and in May, 1859, added one foot to the solid dam, making one foot above the rock, and put twelve inch flash-boards thereon. The plaintiff claimed that he had commenced the occupation of the power above, for mill purposes, in April, 1859. Hence the dispute and arbitration.

On a former hearing, the court decided in favor of the defendants, and the cause now comes up on the complainant's motion for rehearing.

The arbitrators, in their award, determine that the defendants "have the right to keep up and maintain the cap-log or permanent rolling way of their said dam to the top of the great rock in their pond above said dam," and no higher, and to keep on said cap-log flash-boards twelve inches wide at all times, except in times of freshet."

It is not necessary to a complete award that it should execute itself. That is not always possible. But it should be in its terms reasonably certain; it should, as a general rule, leave nothing to be performed, but the mere ministerial acts needed to carry it into effect. It should end controversy, and not leave its own meaning open to future controversy. It should be certain as a judgment of court. A judgment of court may need process to enforce it; but that could hardly be called a final judgment which requires another judgment to determine its meaning.

The object of an arbitration is to prevent future dispute. This object can hardly be said to be carried into effect when, in defining rights of the parties, terms are used which might require another lawsuit to fix their meaning, and still less if left open to continual lawsuits at the pleasure or ill-will of the parties.

It should leave no doubt as to the nature or extent of the duties imposed by it upon the parties. Russell on Arbitrators, 277. It may require future ministerial acts to be done by the arbitrators or others, but cannot reserve any judicial act to be done. Id. 274. His duty is to make a complete and final determination, and it is a breach of that duty to leave any thing to be determined hereafter. Id. 722.

The word "freshet" varies in its meaning in various rivers, in

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various years, and in various seasons of the year. If any mode had been provided in the award settling its meaning, then, perhaps, according to the maxim, *id certum est quod certum reddi potest*, the award might be considered sufficiently certain ; but in case of a suit, a jury could only decide that the state of the water in the particular case before them did or not constitute a freshet, and this would necessitate constant litigation. If, as the learned counsel of the defendants in his very able argument, contends, the meaning of the award was that the flash-boards should be removed whenever they "obstruct the ordinary effective power of the plaintiff's privilege," it would approach nearer to certainty, and the state of things requiring the removal of the flash-boards could be at any time better ascertained, than when left to be determined by the opinions of witnesses or jurors, or even practical mill owners themselves, as to what constituted a freshet.

The bill states that the defendants claim the true meaning of the award to be, that the defendants have the right to maintain flash-boards on the dam until they are carried away by the waters of the river.

It implies no censure on arbitrators that, not being practical mill owners or engineers, they have used a word which may seem to others more ambiguous than it did to themselves. The complainant alleges that he intended to object to the reception of the report, but that the court adjourned before he could find his counsel in the case. And at the former hearing, the complainant made and contended for several objections to the award, and did not (as he does now) rely principally on the uncertainty of it.

For the reasons before given, a rehearing must be granted.

Rehearing granted.

Wheaton v. Pike.

WHEATON V. PIKE.

(9 R. L. 132.)

Promissory note — interest.

Where a promissory note is made payable at a given time after date, with interest payable semi-annually, interest may be computed, in making up the judgment, on all installments of interest overdue and remaining unpaid; but no installments of semi-annual interest will be considered as due after the maturity of the note, because, after that, both the accruing interest and the principal are due, not on any particular day, but every day till they are paid.

ASSUMPSIT against the defendant as maker of the following promissory note:

“\$1,000.00.

PROVIDENCE, August 28, 1860.

“Three years after date, I promise to pay to the order of James Wheaton one thousand dollars, with interest payable semi-annually, value received.
JONATHAN PIKE.”

The action was brought at the October term, 1868, of the supreme court for this county, and the defendant having submitted to judgment, the question of the proper mode of computing interest was argued.

John P. Knowles, for plaintiff.

Eames, for defendant.

DURFEE, J. This is an action on a promissory note for the payment of one thousand dollars, three years after date, with interest payable semi-annually. The defendant has submitted to judgment, and the question made to us relates to the computation of interest in making up the amount of the judgment; the plaintiff claiming interest on the semi-annual dues of interest from the time they severally became payable, making claim as if interest was payable semi-annually after as well as before the maturity of the note, though he offers no proof that the debtor ever agreed to pay interest thereon after they became payable, or that he demanded payment thereof previous to the suit.

There is upon this question a conflict of decision. In some States interest is not allowed upon the interest thus accruing, when after it became due, there has been no demand or agreement for its payment. *Ferry v. Ferry*, 2 Cush. 92; *Hastings v. Wiswall*, 8 Mass. 455; *Wilcox v. Howland*, 23 Pick. 167; *Doe v. Warren*, 7 Greenl. 48; *Bannister v. Roberts*, 35 Me. 75; *Stokely v. Thompson*, 34 Penn. 210; *Niles v. The Board, etc.*, 8 Blackf. 158; *Leonard v. The Adm'r of Villars*, 23 Ill. 377; *Connecticut v. Jackson*, 1 Johns. Ch. 13; *Henderson & Cairns v. Hamilton*, 1 Hall (N. Y.), 314.

But in other States, interest is allowed on such interest from the time it becomes payable, without any subsequent demand by the creditor, or agreement by the debtor that it shall be paid. To this effect are the cases of *Pierce et al. v. Rowe*, 1 N. H. 179; *Catlin v. Lyman*, 16 Vt. 44; *Mann v. Cross*, 9 Iowa, 327; *Doig v. Barkley*, 3 Rich. (S. C.) 125; *Gibbs v. Chisholm*, 2 N. & M. 38; *Singleton v. Lewis*, 2 Hill (S. C.), 408. We find the cases of *Kennon v. Kennon*, 1 Taylor (N. C.), 231; *O'Neill v. Sims*, 1 Strobb. 115; *Watkinson v. Root*, 4 Ham (Ohio), 373; *Talliaferro's Ex'rs v. King's Adm'r*, 9 Dana, 881, also referred to in support of the same doctrine, though we have not been able to examine them. And of some of these cases, it is claimed, that they have held that, even if the principal be due at or before the first installment of interest is due, interest is to be charged upon the interest from the time it is payable. 1 Walton's A. L. Cas. (2d ed.) 539.

In *Hollingsworth v. The City of Detroit*, 3 McLean, 472, it was held, that interest was recoverable on interest payable semi-annually, according to the terms of the coupons of certain bonds of the city. It is, however, remarked in this case: "The coupons were negotiable, by delivery; and no question is made whether, when due, a demand of payment was made, or whether such demand was necessary. The point not being raised need not be considered." And, again: "It is notorious, that the city was unable to pay the interest as it became due, and it could not have been collected by legal means."

In *Connecticut Mutual Life Insurance Co. v. Cleveland, etc., Railroad Co.*, 41 Barb. 9, there was a similar decision. The court (SUTHERLAND, P. J.) said: "The coupons are negotiable promises to pay a certain sum of money, on a certain day, to the holder; so much as to be cut off and circulated independently of the bonds. If not paid when due, I think interest should be allowed by way of

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damages, for the delay of payment." The case does not appear to be in the line of the New York precedents, unless there is some reason for allowing interest upon coupons for interest, which does not apply to dues of interest payable in the more usual form. The reason is, we think, rather the other way; for, from the fact that the coupons are detachable, and may circulate from hand to hand, it is, almost necessarily, to be inferred, that the holder is expected to present them to the debtor and demand payment thereof, and the more especially if they are payable on presentment at a particular place, and therefore, from a neglect of such presentment and demand, a waiver of interest is more readily to be presumed.

In this State, in the case of *The National Exchange Bank v. The Hartford, Providence and Fishkill Railroad Co.*, 8 R. I. 375, tried on demurrer to the declaration, in which the interest sued for was declared to be payable "half-yearly, on the first day of January and the first day of July, in each year, at the office of the said defendants, in said Hartford, on the delivery of the warrant," etc., interest was allowed on such interest *from demand*.

In the case of *The Connecticut Mutual Life Insurance Co. v. Cleveland, etc., Railroad Co.*, the action was for the amount due on 140 coupons of 20 bonds, and was against guarantors of the bonds. In the statement of the case it is said: "The only demand ever made for the payment of the coupons, before the suit was brought, was one made on the assignees of the Ohio Life Insurance and Trust Company, at the office of which company, in New York, they were made payable. The company itself had previously failed, and had no office in New York." We infer from this, that demand was not made for the payment of the coupons as they became due.

It appears in this case, as well as in *Hollingsworth v. The City of Detroit*, that the makers of the bonds had failed. Whether the decision would have been the same if they had continued solvent, and had always paid the coupons when due, upon presentment, is not distinctly manifest; but in both cases a disposition is evinced to criticise the rule which is the more unfavorable to the allowance of interest, and to disparage the grounds on which it rests.

The reasons assigned for not allowing interest are, first, that interest on interest savors of usury, and is liable to bear with oppressive hardship on the debtor; and, second, that the creditor, from his forbearing to call for the installments of interest when they become due, may be presumed to have waived his claim to interest on the

same. These reasons are not entirely consistent; for, if the interest is not to be allowed for the first reason, there can be no waiver of interest to be presumed. It is also urged, that interest, if so allowable, upon annual or semi-annual dues of interest, should, for the same reason, when the debt is payable with interest at a particular time, be allowed from that time upon the interest then due, as well as on the principal. *Doe v. Warren et al.*, 7 Greenl. 48, 50.

But, on the other hand, it is urged that interest upon such interest, whatever savor of usury it may have, is not usurious, for after such interest is due the debtor may lawfully agree to pay interest thereon, and if he was paid interest thereon he cannot recover it back; that no rule should be adopted which favors the debtor at the expense of the creditor; and that there is no good reason why money due at a particular time, for the use of money, should not carry interest from that time in the same manner as money due for any thing else. In South Carolina, where the rule accords with this view, it has been held that where a party contracts to pay a sum of money, with interest thereon, on a given day, when the day arrives the interest becomes principal, and bears interest for the future. *Doig v. Barkley*, 3 Rich. Law R. 125.

There is a reason for not allowing interest upon interest, applicable to negotiable securities, which we do not find referred to; namely, that it may not be known to the debtor to whom the interest is to be paid; but it may be replied, that the same reason would hold in regard to the principal of a negotiable security payable at a particular day without interest, upon which, nevertheless, interest accrues after its maturity.

In this State there is no reported decision which determines the precise question before us, and we feel free to adopt the rule which best commends itself to our judgment. There are some considerations of a practical kind which would lead us to refuse the interest until after a demand, and perhaps a decision to that effect would not seriously conflict with the usages of business; but we think the rule allowing interest is, upon the whole, better grounded in the principles and analogies of the law, and more consonant with the modern ideas in regard to interest, as exhibited both in jurisprudence and legislation. We adopt the rule allowing interest upon installments of interest, overdue and remaining unpaid.

We think, however, that upon principle, where, at least, the note is like the one here in suit, the rule does not properly extend to

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interest accruing after the principal has matured. After that both the accruing interest and the principal are due, not on a particular day, but every day, until they are paid. The amount of the judgment in this case, therefore, should be the amount of the principal of the note, with simple interest thereon to the present day; and also the amount of the semi-annual dues of interest, including that which accrued when the note became due, with simple interest thereon to the present day.

ATLAS BANK v. BROWNELL.

(9 R. L. 163.)

Surety—defense of. Evidence.

In a suit against a cashier of a bank, and his sureties on their bond, where the defendants pleaded severally, it is no defense to the suit that the directors have been negligent in examining his accounts.

To avoid the bond on the ground of fraud on the part of the bank or its directors, there must be a fraudulent concealment of something material for the surety to know.

The admission of the cashier, that he had paid out large sums of money without the consent of the directors, is admissible evidence.

MOTION for new trial of an action of debt on a bond given by the defendant Brownell as cashier of the Atlas Bank, and by his sureties; based on exceptions to the rulings of the judge who presided at the trial, which are fully set forth at the commencement of the opinion of the court.

Hayes and Ripley, for plaintiff.

Payne, and B. N. & S. S. Lapham, for defendants.

POTTER, J. This was a suit on a bond given March 18, 1866, by Thomas H. Brownell, as cashier of the Atlas Bank, with Thomas R. Holden, Albert W. Smith and Sheffield Smith, as sureties, providing, that if said Brownell "shall in all things well and faithfully discharge the duties of his said office, as cashier of said

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bank, and do and perform all such acts as may from time to time, by the board of directors of said bank, be required of him as such cashier, to do and perform, whether under the present or any subsequent appointment to such office, then," etc.

To this, Sheffield Smith, one of the defendants, pleaded, 1st, not his deed; 2d, performance; and the plaintiffs assigned breaches. The same pleas were filed by the other defendants.

A verdict was rendered for the plaintiffs at the October term of this court, 1868, and the cause now comes up on exceptions to the rulings of the judge.

1. That the defendants offered to prove that between December, 1866, and September, 1867, the accounts of the Atlas Bank were short at the clearing bank, and that notice of it was given to the Atlas Bank, the defendants intending to follow it by other evidence, showing negligence on the part of the officers of the plaintiffs' bank, which evidence was ruled out by the judge.

2. The defendants offered to prove, that prior to 1866, the cashier, Brownell, had lost money by gambling, and offered to prove that a short time before his election he had lost money by gambling; that the directors knew it; had a consultation about it; and in consequence, concluded to increase his bond from \$10,000 to \$15,000, and require an additional security; and that Sheffield Smith became such additional security on the same; that the directors did not communicate to him the fact that said Brownell had so lost money, and that his bond had been increased, and an additional surety required thereon on that account; which evidence was ruled out.

As to the first exception, we do not consider that the mere neglect of the directors to examine into the condition of the bank is any valid reason why the sureties of the cashier should not be held liable for his defaults. In the case of the *Pittsburgh, Fort Wayne and Chicago Railroad Co. v. Schaeffer et al.*, 8 Am. Law Reg. N. S. 110, the supreme court of Pennsylvania held that the sureties of a railroad officer were not released by the neglect or default of other officers of the corporation, even if they knew of his default and connived at it. In this case the monthly returns had not been made, as required. "Were the rule different, by a conspiracy between the officers of a bank or other moneyed corporation, all the sureties might be discharged." See the cases referred to there. And, to use the language of Judge STORY,

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“mere laches, unaccompanied with fraud, would not discharge the sureties.”

In a similar case (*Mactaggart v. Watson*), before the House of Lords, A. D. 1835, 3 Cl. & F. 526, a trustee under the Scotch Bankrupt Act, proved a defaulter. The creditors and commissioners had neglected to require him to account, as the law provided. Lord BROUGHAM, in delivering judgment, said the defaulter had given bond to account, and that it was no excuse that the other party did not see that he did it; that a party engaging that another shall do a thing is not released, unless the obligor has prevented the thing being done, or connived at its omission, or enabled him to do something he ought not to do, or to leave undone what he should have done, and it appears that but for such conduct the default would not have happened. See, also, *Amherst Bank v. Root*, 2 Metc. 522.

It is also objected that the admissions of the cashier were not legal evidence against the sureties, and were improperly admitted. In stating the rule as to the admissibility of the evidence of the principal against the sureties, Starkie (6th Am. ed. 1837, 2,775) states some of the cases which have been decided.

But Greenleaf (12th ed., § 187, vol. 1, page 215) lays down the rule, that if the declarations of the principal were made during the transaction of the business for which the party was bound, so as to become part of the *res gestæ*, they are admissible against the surety; otherwise not; and that all declarations of the principal made subsequently should be excluded: by analogy to the case of agency. See, also, Phillips on Evidence (5th Am. ed., vol. 1, pp. 525, 526).

And this rule is laid down without any limitation, or any intimation as to the nature of the action to which it is to be applied, whether it was against the surety alone, or against all jointly. And in *United States v. Cutler*, 2 Curtis, 617, which was a suit against Cutler, navy pension agent, and his sureties (but Cutler not served), Judge CURTIS intimated his opinion that the rule was as above stated, although the case was not decided on that point.

So far as we have been able to examine the cases relied on, they are cases where the suit was against a guarantor, or surety on a note, etc., or on a bond against the surety alone. *Evans et al. v. Beattie*, 5 Esp. 26, was a suit on a guarantee for payment of goods. In *Boston Hat Manufactory v. Messinger et al.*, 2 Pick. 223, the admission was rejected because it was an admission, not of a fact, but

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of the legal effect of certain things. *Smith v. Whittingham*, 6 C. & P. 78, was a suit, so far as appears, against the surety alone, and the admissions of a clerk after his dismissal were rejected, as he was alive and might be called. In *Owings v. Grubbs, Adm'r*, 6 J. J. Marsh. 31, a statement of one joint maker of a note was ruled inadmissible for the other. In *Faulkner v. Whitaker*, 3 Green (N. J.), 439, admission of one of two persons claimed to be partners, held inadmissible, as proving partnership, against the other. In *Bondurant, defendant in error, v. Bank of Alabama*, 7 Ala. 830, 835, the court seem to recognize the rule, as laid down by Greenleaf, that subsequent admissions are inadmissible, but that was a case against a surety alone, and in that case the declarations of a sheriff were admitted as part of the *res gestæ*, so that a decision of the effect of subsequent admission was unnecessary. In *Dexter v. Clemans*, 17 Pick. 175, the admissions of the maker of a note were not admitted in a suit against the surety. *Daves, etc., v. Shedd et al.*, 15 Mass. 7, only decides that a judgment or a recognizance against the principal is not evidence against the surety. And *Schnetzell v. Young*, 3 Har. & McH. 502, holds that in a suit against the administrator of a surety, a payment against the principal was not evidence.

Many of the decisions have turned on particular points, whether the evidence was to be considered as hearsay and not the best evidence, or original admission of parties to the record, admissions against interest.

In *Whitenash v. George*, 3 M. & R. 42; 8 B. & C. 556, the entries of a deceased clerk of a banker in books kept as clerk, were admitted. In *Goss v. Watlington*, 6 Moore, 355; 3 Br. & Bing. 132, entries of a deceased beadle, in a book kept by him, were admitted against the surety, as it was a public book, but receipts given by him were rejected. In *Middleton v. Melton*, 10 B. & C. 317, the court went further, and held that entries of a deceased collector in a private book were admissible against the sureties, as entries made *against interest*, although the persons who paid the money were alive and could be called; and the judges, in their opinion, say that receipts would be admissible also on the same ground.

But it seems now to be settled that these admissions, when receivable at all, are receivable as original evidence, and not as hearsay, and although the party admitting could be produced. It

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is received as evidence that he made the admission; it does not necessarily follow that the fact was admitted.

Where a surety was sued separately (as in most of the previous cases), there would be no difficulty in applying the rule (if it was a rule) against the admissibility, as against sureties, of admissions of the principal subsequently made; but where the suit is against the principal and sureties jointly, the difficulty becomes obvious. The admission of the principal is admissible against himself; how can it be rejected as against the surety; the plaintiff must recover against all or none. And the fact of severing in pleading can make no difference as to this. If the plaintiff fails against one, he must fail entirely in that suit. And we think that in joint suits the admissibility of such admissions must now be considered as the rule. *Amherst Bank v. Root*, 2 Metc. 522, citing 1 B. Monroe, 181; and see *Walling v. Roosevelt*, 1 Har. (N. J.) 41, 45.

The case of principal and surety, indeed does not stand on exactly the same ground as a partner, etc., where the relation is such that the liability is co-extensive and each can involve the other, and each is, for certain purposes, the agent of the other. But the reason, nevertheless, seems to apply; the sureties having put it in the power of the principal to involve them in certain liabilities.

The remaining objection is, that the defendants offered evidence to prove that the cashier had lost money by gambling, that the directors knew it, had a consultation about it, and, in consequence, concluded to increase the bond from \$10,000 to \$15,000, and require an additional surety; that Sheffield Smith became such surety, and that the directors did not communicate to the surety the facts that he had so lost money, and that the bond was increased, and an additional surety required thereon on that account; and this evidence was ruled out.

Ordinarily, the concealment, to make void a contract, "must amount to the suppression of facts which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent." Story's Eq. Juris., § 204. But Judge STORY lays down further, that, in the case of a surety, concealment of facts which go to increase his risk amounts to a fraud on the surety; and the omission to disclose is equivalent to an affirmation that the facts do not exist. Story's Eq. Juris., §§ 214, 215, 324, 383. But we think this doctrine of the text-books is stated much more strongly than the decided cases warrant. In *Railton v. Matthews*, 10 Cl

& F. 934, plaintiffs appointed an agent and took bond, they knowing the agent had misapplied moneys in a former agency, and not communicating it. It was contended that, to discharge the surety, the concealment must be willful, and with a view to the advantage of the obligee. Lord CAMPBELL, in delivering judgment in the House of Lords, said, it would do to make the liability depend on the *motive* of concealment; it was enough that the plaintiffs knew facts material for the surety to know and did not disclose them; the motive might have been kindness to the agent; the effect would be the same; the fact that he was in arrear, and had been guilty of fraudulent conduct, and was a defaulter, were facts material for the surety to know. In a later case (*Hamilton v. Watson*, 12 Cl. & F. 109), Lord CAMPBELL, in delivering the judgment of the House of Lords, said, that it would put an end to the Scotch practice of giving security for cash loans, if it was necessary for the creditor to disclose every thing material for the surety to know; and laid down this as the criterion whether the disclosure should be voluntarily made by the creditor; "whether there is any thing that might not naturally be expected to take place in the transaction, *i. e.*, whether there be a contract between the debtor and creditor, to the effect that his position shall be different from that which the surety might naturally expect," but that if there be nothing of this sort, then the surety, if he would protect himself, must inquire.

In *North Brit. Ins. Co. v. Lloyd*, 10 Exch. 523, B, who was surety for a loan upon stock for A, applied to the plaintiffs, before the loan became due, to be released on procuring other surety, and plaintiffs consented. A applied to the defendant to become surety, and represented that his stock would otherwise be sacrificed, but did not communicate the fact that the former surety was to be released. The defendant testified, that if he had known that, he would not have become surety, but on cross-examination, admitted "that he relied on the solvency of Sir T. Branche," the principal.

In the course of a desultory running argument between the court and counsel, the judges criticised the decision in *Railton v. Matthews* as going too far, and say that the point decided by Lords CAMPBELL and COTTENHAM in that case was, in effect, that it was not necessary, to render a concealment fraudulent, that it should be made with a view to the advantage of the person concealing. The court hold, that the non-disclosure of the change of security would not vitiate the guaranty, unless fraudulently kept back, and that

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there was no ground in this case to impute fraud; that the former surety might well wish to be released for other reasons than doubt of Sir T. Branche's solvency.

In the *Franklin Bank v. Cooper*, 36 Me. 179, the directors knew of the cashier's default, and took bond from him to account for all property *heretofore* intrusted to him, etc. *Held*, that the surety had a right to presume that the transaction was in the ordinary course of business; that the bank was bound to communicate facts increasing the risks, and which would have an important influence on the decision of the surety.

In the case of *Bank of the United States v. Etting*, 11 Wheat. 59, the United States supreme court, being equally divided in opinion, the question was not decided.

We think that it is going too far to say that the creditor is, in all cases, and without being inquired of, bound to communicate every thing that it is important for the surety to know, and that would increase his risk. Under such a rule no one would ever know when he could rely on a bond, and it would lead to a good deal of litigation.

We think the safe rule is, that to avoid the bond, there must be, on the part of the creditor, a fraudulent concealment, or withholding of something material for the surety to know. Would the fact which the defendant offered to prove, if proved, have amounted to a fraudulent concealment or withholding? It is not alleged here that the directors withheld any information inquired for, or said or did any thing which could have a tendency to mislead the surety, or made any, the least, effort to induce the defendant to become surety. If there had been an actual default, and an attempt by the directors to cover it up, or re-imburse themselves at the expense of the surety, the case would be different.

Moreover, the cases which we have referred to are cases in which the information withheld or not disclosed, related in some way to the business which was the subject of the suretyship. In this case, the undisclosed information related, not to the business which was the subject of the suretyship, and not to the conduct of the cashier, as cashier, but to his general character. It did not follow that because he gambled he would fail in his duty as cashier, and the exceptions do not show that his actual delinquency had any connection with his gambling. The directors may have deemed it advisable to demand an increase of his bond because of his gamb-

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ling; and so they might have deemed if they had learned he was keeping a fast horse, or speculating in the stocks. But would it have been their duty, unless inquired of, to impart their knowledge to the sureties? We think not, in the absence of a more confidential relation than that which is implied in the mere giving and accepting of the surety-bond. If, when there is no such confidential relation, the sureties wish to have the obligees affected with a duty to give such information, they should inquire for it. Otherwise, it may be supposed that they are content with what they themselves know, or with inquiries which they have made elsewhere.

New trial refused.

GARDNER V. HOPE INSURANCE COMPANY.

(9 R. I. 194.)

Constitutional law. Corporation — assessment of shareholders.

Plaintiff owned stock in the defendant's company, whose charter, subject to amendment, alteration or repeal at the pleasure of the general assembly, provided that the stockholders should not be liable beyond the amount of their shares for any loss sustained by the company or for any debt due thereon. Afterward the general assembly enacted that a company might call up its capital stock if reduced from its original amount by losses, by assessment on the stockholders, pursuant to which law defendant assessed plaintiff. *Held*, that the act authorizing the assessment was constitutional.

THIS was an action brought to recover the value of shares in the capital stock of the defendant corporation, which the defendants refused to transfer upon the order of the plaintiff. The defendants refused the transfer, because of an alleged indebtedness of the plaintiff to the corporation for unpaid assessments on said stock, made to fill up the capital of the company, reduced from its original amount by losses in business.

The case was submitted to the court upon an agreed statement of facts, in which it was admitted that the assessments in controversy were regularly made in accordance with the provisions of chapter 635 of the public laws. Also, that the company's charter was granted subject to amendment by the general assembly, as provided by section 14 of chapter 125 of the Revised Statutes.

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B. F. Thurston and *Gardner*, for plaintiff. The question raised by the agreed statement of facts in the case is, whether or not the assessment upon plaintiff's fully paid stock, made without his assent, to make good depreciations of the capital stock, is legally due and payable from him to the corporation.

I. Having become the owner, prior to the passage of chapter 635 of the public laws, of fourteen shares of fully paid stock of the corporation, the plaintiff had acquired, by contract, the obligations of which neither the legislature, nor the corporation acting under its authority, could alter or impair, a vested right of property in said shares concerning which he could not be disturbed, or subjected to additional burdens, as contemplated by said chapter, without his assent. *Hartford & New Haven Railroad Co. v. Crowell*, 5 Hill, 383; *Winter v. Muscogee Railroad Co.*, 11 Ga. 438; *Byron Stevens v. Rutland & Burlington Railroad Co.*, 20 Vt. 545; *E. P. Livingston v. D. Lynch, Jr., et al.*, 4 Johns. Oh. 573; *Gifford v. N. J. Railroad Co.*, 2 Stockt. Ch. (N. J.) 171; *Fay's Executors v. Livingston & Big Sandy Railroad Co.*, 2 Metc. (Ky.) 324; *Scofield v. Eighth School District*, 27 Conn. 499; *Indiana & Ebensburg Turnpike Road Co. v. Amon Phillips*, 2 Penrose & Watts (Penn.), 184; *Everhart v. Philadelphia & Westchester Railroad Co.*, 28 Penn. 339; *Ellis v. Marshall*, 2 Mass. 269; *Hamilton Mutual Insurance Co. v. Hobart*, 2 Gray, 543; *N. C. J. & G. N. Railroad Co. v. Harris*, 27 Miss. 517; *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268; *Call v. Hagger et al.*, id. 430; *Great Falls & Conway Co. v. Copp*, 38 N. H. 124; *Kennebec & Portland Railroad Co. v. Kendall*, 31 Me. 370; *Titcomb v. N. M. & F. Ins. Co.*, 8 Mass. 326; *Boston & Lowell Railroad Co. v. Salem and Lowell*, 2 Gray, 1; *Fletcher v. Peck*, 6 Cranch, 87; *Curran v. State of Arkansas*, 15 How. 304; *Planters' Bank v. Sharp*, 6 id. 301; *Burmester v. Norris*, 8 Eng. L. & E. 487; *Gupecke et al. v. City of Dubuque*, 1 Wall. 175; *Florentine v. Barton*, 2 id. 10; *The Binghamton Bridge*, 3 id. 51; *Havemeyer v. Iowa Co.*, 3 id. 294; *McGee v. Mather*, 4 id. 143; *Osborn v. Bank U. S.*, 9 Wheat. 738; *Union Locks & Canal Co. v. Towne*, 1 N. H. 44; *Banet v. Alton & Sangamon Railroad Co.*, 13 Ill. 505; *Middlesex Turnpike Co. v. Swan*, 10 Mass. 384, 390; *Ware v. Grand Junction Water Co.*, 2 Russ. & Mylne, 461; *Green v. Briggs*, 1 Car. 311; *Dartmouth College v. Woodward*, 4 Wheat. 535; *Trente v. Taylor*, 9 Cranch, 43; *Atlantic DeLaine Co. v. Mason et al.*, 5 R. I. 463.

II. Section 14 of chapter 126 of the Revised Statutes does not

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give or imply power to alter such vested right acquired under the charter by the plaintiffs; for it is the charter only and the rights and liabilities of the corporation and of its corporators as such in consequence thereof that can be varied by act of the legislature, and not the private contracts made between the corporation as one party and of its corporators as the other. *Oldtown and Lincoln Railroad Co. v. Veazie*, 39 Me. 571; *Allen v. McKim*, 1 Sum. 276; *Sage, etc. v. Dillard, etc.*, 15 B. Monr. 340; *City of Louisville v. President and Trustees University of Louisville*, id. 642; *University of Maryland v. Williams*, 9 Gill. & Johns. 409; *St. Mary's Church*, 7 S. & R. 562; *Cincinnati v. Evans & Co.*, 13 Gray, 253.

III. The fact that chapter 635 is a public law instead of an amendment to the charter, does not vary the question of power to interfere with the plaintiff's vested rights in the manner contemplated by said chapter, for the authorities above cited clearly show that it could not be legally done either by authority of public or private legislation. *Hampshire v. Franklin*, 16 Mass. 84.

Currey, for defendant.

BRAYTON, C. J. The charter of this company, as it was originally enacted, in June, 1858, provided, that after the capital stock should be paid, the directors should, once a year or oftener, cause a dividend of so much of the profits of the company as they may judge advisable. *Provided, however, that in case of a diminution of the capital stock by losses no dividend shall be made until a sum equal to such diminution, arising from the profits, be added to the capital stock.*

There was another proviso, viz., section 3 of the charter, which declares "that the stockholders of said company shall not be liable to any responsibility farther than the amount of their respective shares and interest thereon, for or on account of any damage or loss sustained by said company, or for or on account of any debts due thereon."

The charter was passed and made subject to the provisions of chapter 125, section 14 of the Revised Statutes, which provides that "all acts of incorporation hereafter granted may be amended or repealed at the will of the general assembly, unless express provision shall be made therein to the contrary."

In March, 1866, by chapter 635, it was enacted, that "whenever the capital stock of any insurance company shall be diminished by

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reason of losses or from any other cause, the stockholders of such company, at any legal meeting thereof called for the purpose, may (after making due allowance from the assets of the company of such amount as may be required to re-insure its outstanding risks) assess such further sum as may be necessary to fill up the capital stock to its original amount upon the several stockholders, in proportion to the amount of stock owned by each, and the stock of every stockholder shall be pledged and liable for such assessment."

The assessment in question was made under, and in strict conformity to, the provisions of this chapter, and the question raised is, whether the assessment so made is a valid assessment.

The plaintiff contends that the stockholders had no lawful authority thus to assess any stock fully paid; that the act purporting to confer such authority does not bind the corporation or the members thereof; and that it was not competent for the legislature to confer any such power; and, so far as the act purports to authorize the assessment on plaintiff's stock, it is simply void; and he says, in argument, that the legislature can have no constitutional power to alter or impair the obligation which the plaintiff had acquired by contract in the purchase of his shares of paid-up stock; that he has a vested right of property in these shares, as to which he could not be disturbed or subjected to additional burdens contemplated by chapter 635. The proposition that the legislature cannot impair the obligation of a contract would not require authority, so far as any right had accrued to the corporation, or any member of the corporation, under the power conferred by the charter. It could not be impaired by taking away the power under which that right was acquired. No contract made by the corporation with a third person, or with individual members of the corporation, could be impaired by any alteration of the charter power. But this is quite different from the power to alter or change, or repeal the powers themselves, so that no such rights could thereafter be enacted, and such contract thereafter be made.

The legislature have reserved the power, at any time, to alter or repeal the charter, or any of its provisions. The corporators accepted it upon this condition, and agreed that its provisions might be changed, and every purchaser of stock in this company has assented to these terms, and has agreed to hold his shares subject to this liability to change. There is no limit to the power expressed in the act. In terms it is unlimited.

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There is no difference between the parties here or their counsel as to the *general* rule, that the obligation of a contract in favor of or against the corporation or corporators cannot be impaired, nor can a right under the provisions of the charter be discharged or defeated.

But it is claimed by the plaintiff, that by the original charter he has a right vested in him to be free from assessment, and he rests this claim upon the provision in the charter, that stockholders shall not be liable to any responsibility beyond the amount of their respective shares. He claims that it was a contract entered into with the corporators, that this liability should not be extended. There is no case among all those cited by the plaintiff which holds such doctrine, and he has not been able to find one which supports it.

The cases which are cited do not countenance it, but simply the contrary. It is one of those rights existing only between the corporators and the company as such, not by virtue of any contract entered into, or any act done under the powers conferred by the charter, but solely by force of act of incorporation. And the court, in the case of *Bailey, Trustee, v. Trustees of Power Street M. E. Church*, 6 R. L. 491, not cited, held that such is not a vested right where the legislature has reserved the power to change, and that the exemption from taxation of the pews in the church, unless assented to by a majority of pewholders, was a right existing only during the pleasure of the general assembly, and when the legislature repealed the provision requiring the consent of a majority thereof, and power to tax became unconditional, it impaired the obligation of no contract in the charter, nor did it derogate from any absolute right of the pewholder.

Commonwealth v. Essex Company, 13 Gray, 239. The company was indicted for violation of a statute, passed in 1856, requiring the company to make and maintain in and around their dam a way for the free passage of fish. The charter of the company had been amended in 1848, by authorizing an increase of capital stock, upon condition that they pay all damage for impeding passage of fish accruing to owners above their dam, which amendment the company accepted.

SHAW, C. J., said: "It seems to us that the power" (i. e., to amend or alter) "must have some limit, though it is difficult to define it." The rule, when stated, is this: "That where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or

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rights which have become vested under a legitimate exercise of the powers granted." In that case it was held that the defendant company had, under their corporate power, by payment of all damages to the riparian proprietors above, purchased an exemption from any liability to provide other passes for fish, and that no alteration of the charter, however it might prevent the acquisition of similar rights in the future, could destroy those already created and vested.

In *Oldtown and Lincoln Railroad Co. v. Veazie*, 39 Me. 471, the court say: "It is the charter only, and the rights and liabilities of the corporation, and of its corporators as such in consequence thereof, that can be varied by an act of the legislature, and not the private contracts between the corporation as one party and of its corporators as the other;" and the court held that a subscription for stock was a contract between the subscriber and the corporation to pay money for his stock, upon condition that a certain definite sum should be subscribed for, which condition was to be performed by the corporation before it could call for assessments. The corporation might accept an amendment, nevertheless, by which its rights and obligations might be varied and new duties imposed, and by which the rights and duties of its corporators might be increased or diminished.

Hawthorne v. Calef, 2 Wall. (U. S.) 10. The statute made stockholders personally liable for corporation debts, and the repeal of the act did not exonerate stockholders from debts then existing in favor of creditors of the corporation. It was held void as to creditors, as impairing the obligation of contracts existing, though the corporators would not be liable for subsequent debts.

City of Louisville v. President and Trustees of University, 15 B. Monr. 642. The corporation had received a donation of property. This was held to be a right derived from contract made under their charter, which could not be destroyed by the legislature or taken from the corporation, being vested under its legitimate powers.

Meadow Dam Co. v. Gray, 30 Me. 545, was a suit for subscription for stock. Before payment an amendment of the charter had been made and accepted, which increased the liability of the stockholders. This was held not to affect the contract to pay for the shares, and that the defendant had subscribed for stock assenting to such change as the legislature thought meet to make, and he had no right to object that they had in this respect thought proper to make this change.

There are cases in which it would seem that the power to alter

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had been reserved. None of them hold, or try to sustain the proposition, that there is any right in any corporator derived solely from the charter, created by the act of incorporation only, and independent of any act done by him, or by the corporation itself under the powers granted by the act, which is so vested that it cannot, by an act of the legislature, be changed. In other words, that if other than a constitutional right, it depended upon the pleasure of the general assembly.

Everhart v. Penn. & Ohio Railroad Co., 28 Penn. 839. The original charter authorized the corporation to build and equip a railroad, fixing the amount of capital stock. The capital stock was not sufficient to complete the work intended, and the legislature authorized the creation of preferred stock to the extent of eight thousand shares, to enable the company to complete the road and furnish the necessary rolling stock and equipments. Dividends at the rate of eight per cent to be made upon such preferred stock, before any dividend upon the unpreferred stock. The suit was for installment upon subscription for the original stock.

It does not appear that the legislature had reserved any power to alter or amend the charter, but the amendment was accepted by the company. It is not intimated in the opinion that the case was at all affected by any reservation of authority over the charter.

The court say, that an alteration which works an entire dissolution of the contract entered into by the subscriber to the stock, or which superadds an entirely new enterprise not contemplated, would not be warranted, and the subscriber might resist an assessment for objects essentially different from those originally designed. But modifications, useful, beneficial to the company, and in accordance with the understanding of the subscribers at the time as to the real purpose, will not impair the subscription or furnish a defense.

The purpose of the amendment, say the court, is to complete the work originally designed, for their advantage, by preferred stock, rather than by a loan, which must have the same preference over the original stock. The purpose is pursued by the same general means and in a similar mode; and the subscriber may be presumed to have assented that the company might apply for an amendment necessary or proper for the accomplishment of the end designed by the original association.

In the case before us, the charter provided that when the capital

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should have been reduced by losses, no dividend should be declared or paid until the capital should be filled up, and for this purpose all the earnings were to be applied until the capital should be again full. The company had met with those losses and the capital had been impaired, and their profits were diminished in a much greater proportion than the diminution of their capital. The remedy proposed by an amendment was, to fill up the capital at once by assessment upon the stock, and thereby increase the amount of the dividends. They could, with the stock full, raise the sum necessary to fill it in a much shorter time than if it were not full. It was, every way, for the benefit of the stockholder, and it was in the prosecution wholly of the original design of the corporation.

If the power to alter or amend this charter had not been reserved therein, and within that of *Everhart v. Penn. & Ohio Railroad Co.*, 28 Penn. 839, how unquestionable then should it be where such reservation was made, and the corporation had originally assented to its exercise. If any change could be made, it is difficult to see how one could be made less injurious to any interest of the stockholders, or more unquestionably beneficial to them.

We are of opinion, therefore, that the assessment was lawfully made, and so, by the agreement of the parties, judgment must be for the defendants for their costs.

Judgment for defendants for costs.

MARSH V. HALL.

(9 R. L. 318.)

Bankruptcy — poor debtor law.

The bankrupt act does not suspend or supersede a "poor debtor law" of a State, which permits a debtor, taken on execution, to be discharged on making a general assignment of his property for the benefit of the judgment creditor.

ACTION of debt on bond given by one Amos Aldrich as principal, with David G. Hall and J. Collins Gould as sureties, for the liberty of the jail-yard. A jury trial having been waived, the case was sub-

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mitted to the court upon an agreed statement of facts, from which it appeared that the plaintiffs, at the December term, 1867, of the court of common pleas for the county of Providence, obtained judgment against said Amos Aldrich on the 26th day of February, 1868, in an action of assumpsit on book account, for goods sold and delivered, for \$394.53 debt and \$18.15 costs, and the defendant, on June 2, 1868, was duly committed to the Providence county jail upon the execution issued on said judgment, and thereupon gave, with the defendants as sureties, the jail limit bond. The said Aldrich then took out his citation to the plaintiffs, to show cause why he should not be admitted to take the poor debtor's oath, under chapter 198 of the Revised Statutes; and upon the return of said citation, and a hearing thereon, the plaintiff then and there protesting against the jurisdiction of the magistrates, was admitted to take the poor debtor's oath, and was thereupon discharged in the usual form under said chapter 198, and after such discharge, went off and beyond the limits of the jail.

It was agreed that, if the court should hold that the magistrates had jurisdiction, and the statute under which said proceedings were had was then in force and not suspended by the bankrupt act, judgment should be entered for the defendants for costs, otherwise for the plaintiffs.

James Tillinghast, for plaintiff.

Udike and S. A. Cooke, Jr., for defendant.

DURFEE, J. The plaintiff claims that the discharge of Amos Aldrich as a poor debtor is void under the bankrupt act of the United States, and refers, in support of his position, to the opinion of this court in the matter of the insolvent petition of Gideon Reynolds, and to the cases which are there cited, and some other cases. In the case of Gideon Reynolds, an insolvent petition, preferred after the bankrupt act had gone into effect, by a person within its purview, was dismissed on the ground that the bankrupt act, to the extent of its application, had suspended the insolvent law of the State.

The decision rests upon the ground that, in the broad sense in which the word "bankruptcies" is used in the constitution of the United States, insolvency is a species of bankruptcy, and that when

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the power vested in congress to establish uniform laws on the subject of bankruptcies throughout the United States has been once exercised, the power of the States over the same subject is, *ipso facto*, to the extent of such exercise, suspended or superseded.

The law for the relief of poor debtors and the insolvent law of the State differ in respect to the extent of the relief which they respectively afford, and in their provisions in regard to the assignees under the assignments required by both of them as a prerequisite to the relief which they afford.

First. The insolvent law affords the successful applicant under it exemption or release from arrest or imprisonment on account of all debts or pecuniary claims existing against him prior to his application, unless incurred by a promise of marriage, or originating in tort or criminal conduct. The law for the relief of poor debtors, at most, simply relieves the poor debtor, if successful in his application, from arrest or imprisonment in respect of the debt or claim which is the subject of the suit in which his application is made. It affects none of his creditors, except the prosecuting or committing creditor, otherwise than by the assignment which he is required to make.

Second. The same kind of assignment is required as a prerequisite to relief under both laws; but the assignee under the insolvent law is required to be sworn, and may be required to give bond for the faithful performance of the trust, his powers and duties touching which are quite carefully specified; he is also specially entitled to the assistance of the supreme court, or of the justices thereof, and specially subjected to its supervision, being in these respects recognized apparently as a public officer or agent of the court rather than as the mere trustee for the creditors. On the other hand, the assignee, under the law for the relief of poor debtors, is the keeper of the jail, if the debtor applies for relief after commitment; if before, he is required to be a resident of the State, and is appointed by the court or magistrates who administer the oath, but he is not sworn as assignee, nor is he clothed by the law with any special powers or duties, except that when he is the keeper of any jail, the assignment runs to him and "his successor in office," as well as to heirs and assigns, etc., and such keeper is expressly exempted from liability for any property except such as actually comes to his hands, provided he shall re-assign, in the manner prescribed, to the committing creditor, if a resident of this State, on his request, or to

such person, being a resident thereof, as such creditor shall name. Thus, the poor debtor's assignee, as such, does not appear to be recognized as having any official character, and there is no tribunal of the State which is charged with any duty in relation to the trusts of the assignment any more than in the case of an assignment at common law. We do not perceive any thing in the case of a poor debtor's assignment, however it might be with an insolvent's, which would necessarily occasion any conflict of jurisdiction between the State and the United States, even if a United States court should undertake to dispossess the assignee of the assigned property in favor of an assignee in bankruptcy.

In the points in which the two laws differ, the insolvent law of the State is more nearly allied to the bankrupt act than the law for the relief of poor debtors; but we see no reason why either law should be thought to trench improperly upon the provisions of the bankrupt act, unless it be because of the assignments required, or of some proceeding which may be had under them. Further, we see no reason why the law for the relief of poor debtors should be regarded as obnoxious to such an objection, because of the assignment required of the poor debtor, unless the same kind of an assignment made by him, independently of any statutory proceeding, would be regarded as repugnant to the bankrupt act, and therefore invalid, which, in the absence of fraud, or of any intention to evade or defeat the bankrupt act, there is good authority for thinking it would not.

In the matter of *Hawkins' Appeal*, 8 Am. Law Reg. (N. S.) 205, it was decided by the Supreme Court of Errors of Connecticut, that a voluntary assignment by a debtor, good at common law and made in the form prescribed by the insolvent law of the State, was valid, although the United States bankrupt act was in existence and applicable to the case at the time of the assignment.

In the case of *John Sedgwick, assignee, v. James R. Place et al.* (cited in the above-named case, and also reported in the *New York Times*), the United States circuit court for the southern district of New York refused to set aside an assignment made under the statute law of the State of New York, and to take the assigned property out of the hands of the assignees under the State law and turn it over to the assignee in bankruptcy, all intention to defraud creditors or to prevent the property of the debtor coming to the assignee in bankruptcy being denied by the parties, and there being

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no proof to the contrary. The decision was made by Justice NELSON, and is entitled to more weight as coming from a court of the United States.

The bankrupt act provides a system of general relief, and in this respect is well calculated to supersede and supply the place of the insolvent law of the State, but it contained no conditions specifically adapted to the case of a poor debtor imprisoned, or liable to be imprisoned, for debt. Such a debtor is relievable, if at all, under the bankrupt act, only by proceeding in the ordinary mode, which might, in some cases, prove impracticable. In view of this, we do not incline, in the absence of convincing reasons, to hold that our poor debtor's law has been suspended or superseded by the bankrupt act.

Upon the whole, we are not satisfied that the discharge of Amos Aldrich is void for any reason assigned by the plaintiffs, and shall therefore give the defendants judgment for their costs.

Judgment for defendants for costs.

MANNING V. KEYES.

(9 R. I. 294.)

Bankruptcy — debt provable — judgment for assault and battery.

A judgment in an action of trespass for assault and battery is a debt provable under the bankrupt act.

ACTION of trespass against the defendant for assault and battery of the plaintiff, Ann Manning. At the October term, 1868, of the supreme court, the plaintiff recovered judgment for \$500 and costs, and now moved for execution.

Blodgett, for defendant.

P. E. Tillinghast, for plaintiff, in support of the motion, contended that the judgment upon which execution was asked was not provable in bankruptcy, citing *Kellogg v. Schuyler*, 2 Denio, 73; *Parker v. Norton*, 6 Term. R. 695; *Hughes v. Oliver*, 8 Barr, 426;

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McDonald v. Ingraham, 30 Miss. 389; *Hapgood v. Blood*, 11 Gray, 400; *Spaulding v. People of New York*, 4 How. 21; *People v. Spaulding*, 10 Paige's Ch. 284; *In re James B. Devos*, Amer. Law Reg., Sept., 1868, p. 690; *In re Julius R. Pettis*, id., p. 695; *In re Robert Sutherland*, id., Jan., 1869, p. 39; *In the Matter of Harvey F. Payton*, 7 R. I. 153.

DURFER, J. It was held, under the bankrupt act of 1841, that a judgment in a court of law obtained in an action of tort was a debt dischargeable under and by force of the bankrupt law, *Samuel Bork, in Bankruptcy*, 3 McLean (Cir. Ct.), 217; and see *Comstock v. Grant*, 17 Vt. 512; *Crouch v. Gridley*, 6 Hill (N. Y.), 259. In this case the judgment was in an action of trespass for assault and battery, and, therefore, not being within the exceptions specified in the 33d section of the act of 1867, we think it is a debt dischargeable under that act.

We will direct that execution be stayed till further order.

Execution stayed.

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(9 R. I. 200.)

Promissory note. Recoupment.

In an action by the payee upon a promissory note, the consideration of which was an agreement signed by the plaintiff, to convey to the defendant, on or before January 1, 1866, twenty-five hundred dollars of the capital stock of the King Gold Mining Company, at subscription price, *held*, that the defendant might defend against the action by showing that no transfer or tender of the said stock was made to him until after August, 1866, and might recoup his damages arising from the plaintiff's failure to perform his agreement.

MOTION by the defendant for a new trial of an action of assumpsit, to recover the amount of a promissory note for \$2,500, and interest, made by him. The facts of the case, as well as the grounds of the motion, are sufficiently stated in the opinion of the court.

Gardner, for the motion.

Thurston, Kipley & Co., for plaintiff.

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DURFEE, J. This action was commenced January 28, 1867, and has been twice tried to the jury with verdicts for the plaintiff. The defendant moves for a new trial, one ground of the motion being that the verdict was against the evidence and the weight thereof. We have already expressed an opinion against the motion on this ground, and also upon some of the reasons assigned under the second ground. A second ground for the motion is the discovery of new and material evidence since the last trial, and the defendant having removed by his affidavit an objection which we previously regarded as fatal to the motion on this ground, we will now proceed to dispose of this part of his motion.

The action was brought upon the defendant's promissory note for \$2,500, bearing date of May 23, 1865, payable on demand at bank with interest. The plaintiff claims that the consideration of the note was the following agreement, to wit:

"In consideration of the payment to me by Isaac H. Southwick of twenty-five hundred dollars, the receipt whereof is hereby acknowledged, I agree to transfer or convey to the said Isaac H. Southwick, on or before January 1st, 1866, twenty-five hundred dollars of the capital stock of the King Gold Mining Co., at subscription price.

"PROVIDENCE, *May 23, 1865.*

(Signed.)

N. P. HILL."

No transfer or tender of the stock was made to the defendant until after August, 1866. The paper containing the above agreement was not produced at the trial — the defendant having failed, though he searched, to find the same. He has found the paper since the trial, and he now contends that if he could have had it at the trial, it would have enabled him to defend against the action by showing that the plaintiff had failed to perform his agreement. The defendant makes affidavit to the effect, that until the paper was found by him after the trial, he had either never observed the stipulation in regard to the time, or if so, it had made no distinct impression on his mind.

The plaintiff, without admitting the defendant's right to a new trial in any view, contends that he could not, even if the new trial were granted, make the proposed defense, because the note and the agreement are independent contracts; and that, therefore, his right

to recover on the note would not be affected by his failure to transfer the stock within the stipulated time.

We have, however, come to the conclusion that if this stipulation was not waived, the defendant would be entitled, by way of reduction or *recoupment*, to diminish the amount recoverable on the note to the extent of the loss which he sustained by the plaintiff's failure to perform his agreement.

The doctrine of *recoupment* rests on the equitable principle that the defendant shall be allowed to diminish or defeat the plaintiff's claim by a claim of his own, where both claims grow out of the same contract or transaction. 2 Parsons on Contracts (5th ed.), 740, 741 and notes.

In *Batteman v. Pierce*, 3 Hill, 171, 174, the court say: "For the purpose of avoiding circuitry or the multiplication of actions, and doing complete justice to both parties, they are allowed — and compelled, if the defendants so elect — to adjust all their claims growing out of the same contract in one action." In that case the action was upon a promissory note given by the defendants for several lots of wood purchased of the plaintiff. The defendants were at liberty to cut the wood and pile it on the land to dry, and were to have two seasons, that is to say, two winters and one summer, to take away the wood. The plaintiff owned a piece of fallow ground adjoining the wood, and agreed at the sale to guaranty the purchasers against any damage to the wood in consequence of burning his fallow. The defendants cut and piled the wood they purchased. The next spring after the sale the plaintiff set fire to and burned his fallow, and all the defendants' wood was burned up. The evidence of these facts having been struck out on the ground that it constituted no defense or answer to an action on the note, the supreme court, on exceptions, granted a new trial on the ground that the defendants might *recoup* their damages arising from the loss of the wood. We see no reason why a *recoupment* may not be as properly allowed in the case at bar as in the case cited. And see *Ives v. Van Epps*, 22 Wend. 155; *Reab v. McAllister*, 8 id. 109, and 4 id. 483; *Spalding v. Vandercook*, 2 id. 431; *Harrington v. Stratton*, 22 Pick. 510; *Stacey v. Kemp*, 97 Mass. 166; *Perley v. Balch*, 23 Pick. 283.

This case does not commend itself very strongly to our favorable consideration; for we find it difficult to believe that the defendant can have failed to find opportunity to make the defense which he proposes, in both the trials, without some fault or negligence on his

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part. But, the plaintiff being now a resident of Colorado, it may be that a refusal to grant a new trial will practically result in his losing the benefit of his remedy by cross-action on the agreement. We, therefore, though with much hesitation, grant him a new trial, subject to the following terms, to wit: the defendant shall pay the plaintiff's costs remaining unpaid up to the present time, and shall not, in any event, recover said costs, or any costs which he has paid; he shall pay the plaintiff \$200 for his expenses in coming to attend the trial and returning again; these payments to be made on or before the first day of next term; and the defendant's liability on the note being admitted, the new trial shall be confined to the questions of the plaintiff's liability for the non-fulfillment of his agreement to transfer the stock, and the amount of the damages ensuing therefrom to the defendant, to be allowed in diminution of the amount to be recovered by the plaintiff on his note, and that neither party recover costs on this motion.

New trial granted.

LOCKWOOD V. MECHANICS' NATIONAL BANK.

(9 R. I. 303.)

National bank — by-laws — transfer of shares.

A national bank has the power, under the National Currency Act of Congress of 1864, chap. 106, to make by-laws providing that the shares of its capital stock shall be transferable only on its books, that no stockholder shall be allowed to sell or transfer his stock while indebted to the bank, without the assent of its directors; and that the stock of any stockholder shall be held pledged and liable for the payment of any debt due or owing from such stockholder, and may be sold at public auction for the satisfaction of such debt, on default of payment thereof.

In all cases where an act is to be done by a corporate body or a part of a corporate body and the number is definite, a majority of the whole number is necessary to constitute a legal meeting, although at a legal meeting, where a quorum is present, a majority of those present may act. Hence, a by-law adopted at a meeting of six *ad interim* directors of a national bank, which had twelve directors before its conversion, is invalid, because not adopted by a majority or quorum of the board.

THESE were five actions on the case brought against the Mechanics' National Bank, the Commercial National, the Roger Williams

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National Bank of Commerce and the American National Bank, to recover damages of the defendants for their refusing to permit transfers to be made on their books, to the plaintiffs, of certain shares of their capital stock standing in the name of Resolved Waterman, and by him assigned to the plaintiffs.

Jury trials having been waived, the five actions were tried together, and were argued to the court upon agreed statements of facts. From these statements, it appeared that the defendant corporations were national banking associations, organized under the act of congress, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and formed by the conversion into such national banking associations of State banks of the State of Rhode Island, pursuant to section 44 of said act, and the provisions of chapter 535 of the statutes of this State, and that said State banks were corporations organized under charters of the State of Rhode Island. That before and at the time of such conversion of said State banks into said national banks, Resolved Waterman was the proprietor and holder in his own right of certain shares of the capital stock of said banks, and as such proprietor and holder of said stock joined in authorizing the said conversion of said banks into national banks. That upon the conversion aforesaid, all the property, assets and choses in action of said State banks, including the stock-books thereof, were, pursuant to the provisions of said chapter 535 of the statutes of this state, transferred to and vested in said national banks, by virtue whereof said Resolved Waterman became the proprietor and holder of the same number of shares of the capital stock of said national banks, in the place and stead of the shares of stock so as aforesaid held by him in said State banks respectively, and the said Resolved Waterman, from the time of becoming such proprietor and holder of said shares in said national banks, continued to be such proprietor and holder thereof until the making of a transfer thereof by him to the plaintiffs. That sundry promissory notes made by Orray Taft & Co., payable to the order of said Resolved Waterman, and by him indorsed for the sole benefit of said Orray Taft & Co., as accommodation indorser thereof, were discounted by said respective national banks, and upon being presented for payment as they respectively fell due, were not paid, whereof the said Resolved Waterman, as said indorser thereof, had due notice; and the said notes

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severally remain unpaid in the possession of the respective defendant corporations as the lawful holders thereof. That on the 9th day of March, 1867, said Orray Taft & Co., and said Resolved Waterman became and were insolvent, and have so continued from thence hitherto. That on the 7th day of May, 1867, said Resolved Waterman requested permission of said defendant corporations to transfer his share of stock in said corporations to the plaintiffs upon the books of said corporations in the manner prescribed by the boards of directors for the transfer thereof, which permission said defendant corporations refused; whereupon the said Waterman, by his deeds duly executed for that purpose, transferred his shares of stock to the plaintiffs, which said transfers the plaintiffs presented to said defendant corporations, and requested that the same might be recorded upon the transfer books of said banks, which the defendant corporations refused to do; and thereupon the plaintiffs requested the defendant corporations to permit them, as the attorneys of said Waterman, to transfer the said shares of stock to themselves upon the books of the said banks, in the form prescribed by the directors, which request the defendants also refused. That before and at the time of the execution and delivery of said deeds from said Waterman to the plaintiffs, the plaintiffs knew of said Waterman's liability and indebtedness to the defendant corporations, and that the defendants claimed and insisted upon their right to refuse, and accordingly would refuse, to permit said shares to be transferred to the plaintiffs, or any other person or persons upon the books of said defendant corporations until such liability and indebtedness should be fully paid and satisfied. That the said shares of stock have not been sold or disposed of by the defendant corporations.

It also appeared that said Waterman was a director of said Roger Williams Bank at the time of said conversion, and as such director, with the other directors, signed the said articles of association, as well as those of the other defendant banks, were filed in the office of the comptroller of currency according to the provisions of said act of congress, as and for the articles of association of said Roger Williams National Bank under that act; and that, upon the organization of said Roger Williams National Bank, said Waterman became a director thereof, and as such director was present at the meeting of the board of directors when said by-laws were passed, and voted for the passing thereof.

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The by-laws of the Roger Williams National Bank were as follows:

"1st. The stock of each stockholder of this bank shall at all times be pledged and liable for the payment of any debt due or owing from such stockholder, whether as principal debtor or otherwise, to the bank, and may be sold, or so many shares thereof as shall be necessary, by the directors, at public auction, for the satisfaction of such debt on default of payment thereof, and the surplus, if any, shall be paid to such stockholder.

"2d. No stockholder who shall be indebted to the bank as principal debtor, or otherwise, shall, while thus indebted, be allowed to sell and transfer his share or shares without the consent of the directors for the time being."

That of the National Bank of Commerce was as follows:

"The stock shall be transferable at the bank only by the stockholders or their agents, in the form prescribed by the president and directors. No person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of the directors, and this whether indebted as principal, surety, or indorser, either individually or as copartners, and whether the debt has become due or not. The stock of each stockholder shall be liable and may be sold at auction, by order of the president and directors, for the payment of any debts due from such stockholders to the bank, or so much thereof as may be necessary, in default of payment thereof when due; but sixty days' previous notice of such sale shall be given in one of the Providence newspapers, and the surplus of proceeds over such debt and expenses, if any there be, shall be paid to such stockholder."

Those of the three remaining defendant corporations were substantially like that of the National Bank of Commerce, except that those of the Mechanics and American Banks contained no provision for the sale of the stock by the bank for the payment of the stockholders' indebtedness to it.

The suits against the National Bank of Commerce and the American National Bank involved a further question as to the legality of the adoption of such by-law by said banks respectively.

By the agreed statement of facts in the former case, it appeared that, from the time of the organization of the said National Bank of Commerce, it had always had a board of nine directors, duly elected and qualified to act, except that, shortly after the annual

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election in January, 1867, two of the directors became disqualified, namely : Mr. Walter Manton, on the 18th of February, 1867 ; and Mr. Edward P. Taft, on the 9th day of March, 1867. That the by-law in question was entered upon the minute-book of the bank September 4, 1865, the time for holding the regular weekly meeting of the board, when only three of the directors were present ; but the provisions of said by-law, being a copy of the provisions of section 2, article 4 of the act of incorporation, were previously considered and assented to by at least a majority of the full board of directors, in their official capacity, at previous regular board meetings, as and for a by-law of the bank. That the usual course taken in relation to the general management of the business of the bank, both before and after it became a national banking association, was, that when three directors were present, all transactions by them were deemed finished. That, from the time of the passage of said by-law, as aforesaid, all the directors, for the time being, knew of its existence upon the books of the bank, and the same was deemed and reputed by such directors to be a by-law of the bank ; and the discounts of the promissory notes indorsed by said Waterman, as well as all other discounts of the negotiable paper, to which any stockholder of said bank was a party, were made upon the understanding by the board, that, by virtue of said by-law, the bank would be entitled to the lien which said by-law purports to create.

As well before as after the discounting of said fourteen promissory notes, the provisions of said by-law were frequently referred to and spoken of by members of the board at regular board meetings, when at least a majority of the directors were present, and said by-law was then treated and considered by them in the making of the discounts from time to time applied for, as well by members of the board as others, being stockholders of the bank, as furnishing additional protection to the bank for such discounts, and on some of those occasions said by-law was fully and deliberately read to the board by the cashier, or some other officer of the bank, in order that the board, before making the discounts applied for, might fully understand the extend to which said by-law afforded to the bank additional protection for such discounts.

The agreed facts with reference to the adoption of the by-law by the American National Bank are stated in the opinion of the court, near the close thereof.

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Currey & Rogers (Caleb Cushing with them), for plaintiffs.

Bradley, Hart, James Tillinghast and Markland (B. R. Curtis with them), for defendants.

POTTER, J. The by-laws of three of the banks contain provisions that the stock shall be transferable only on the books of the bank, and that no stockholder shall be allowed to transfer, while indebted, without consent of the directors. The by-laws of one other contain these provisions, and also a provision that the stock shall be held pledged and liable, and may be sold, etc. There is some diversity of language, but not enough to affect the present decision.

The by-laws of the Roger Williams Bank contains provisions that the stock shall be held pledged, liable, etc., and that an indebted shareholder shall not be allowed to sell without the consent of the directors.

The question is, had these corporations the power, under the act of congress of 1864, to make these by-laws? and we shall consider all the cases together, as, according to our view, if they had the power to make either by-law, they had the power to make both.

The act of 1864, section 5, specifies that the articles of association may declare in general terms the objects of the association, and "may contain any other provisions not inconsistent with the provisions of this act, which the association may see fit to adopt for the *regulation of the business* of the association and the *conduct of its affairs*." And section 8 empowers the board of directors "to define and regulate, by by-laws not inconsistent with the provisions of this act, the *manner* in which its *stock shall be transferred*, its directors elected or appointed, its property transferred, its *general business conducted*; and all the *privileges granted by this act* to associations organized under it shall be exercised and enjoyed."

The act of 1863, section 11, contained a provision authorizing a bank to make by-laws for "the management of its property, the regulation of its affairs, and for the transfer of its stock."

In the case of *Child v. Hudson's Bay Co.*, 2 P. Wms. 207 (Angell & Ames on Corp., § 356), the company were empowered to make by-laws for the better government of the company, and the regulation of their trade. By virtue of these powers, they made a by-law, by which, if any member became indebted to the com-

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pany, his stock should be liable for the debt. This by-law, in a contest between the assignees in bankruptcy of the stockholder and the company, was adjudged good. In *Cunningham v. Alabama Life Ins. Co.*, 4 Ala. 652, a provision in the charter that the stock should be assignable on the books of the bank under such regulations as the trustees should establish, was held to authorize a by-law, that "no stockholder shall be permitted to transfer his stock while he is in default." In *St. Louis, etc., Ins. Co. v. Goodfellow*, 9 Mo. 149, Goodfellow was assignee for value. By the charter the stock was transferable according to such rules and restrictions as the directors should establish, and they made a by-law prohibiting any transfer by a person indebted to the company, and the certificate stated the stock was transferable on the books, conformably to the charter and by-laws. The court, while they held the assignment good between the vendor and vendee, and that it conveyed all the vendor's right to the vendee, held that the words of the charter justified the by-law, and that what was sufficient to put the purchaser upon inquiry was notice to him. They likened it to a case of set-off. In the case of *Assignees of Waln. v. Bank of North America*, 8 S. & R. 73, the court (p. 89) speak of the case of *Child v. Hudson's Bay Co.*, 2 P. Wms. 207, as recognized law. We shall refer to this again. In the case of *Brent v. Bank of Washington*, 10 Peters, 615, the U. S. Supreme Court, after referring to 8 S. & R. 73, 86, among other cases, go on to say: "Though the charter has not made the note a lien on the stock till protested, * * * yet it has given them the power to prevent a transfer, unless upon their books, by such rules as they may prescribe, which gives them the power to prevent the legal title from passing to the purchaser," etc., etc. In *McDowell v. Bank of Wilmington*, 1 Harrington (Delaware), 27, the articles of association recited and confirmed in the charter, gave the directors power "to make rules concerning the transfer of stock," and also to make by-laws. The directors made a by-law that no stockholder should sell while indebted. The court said they saw nothing in such a by-law unreasonable or repugnant, etc. It did not affect others than members.

The language which was used in the act of 1863, authorizing the banks to make by-laws not inconsistent with any existing law, for the management of their property, the regulation of their affairs, and for the transfer of their stock, is, word for word, the same with the statute of New York (Edmonds' ed., vol. 1, 556, part 1, ch. 18,

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title 3, on the general powers of corporations), as was also a considerable part of the subsequent portion of the section, giving them power to loan, etc. Edmonds, 4, 131. Now we believe the power to make a by-law of the nature now in question was never denied in New York. It is indeed decided in *Bank of Attica v. Manufacturers and Traders' Bank*, 20 N. Y. 501, that as the 19th section of the Bank Act, chap. 260, of 1838 (Edmonds, 4, 132), provides that the shares shall be "transferable on the books of the association *in such manner as may be agreed on in the articles of association*," the provision must be in the articles themselves, and the association could not delegate to the directors a power to make such a by-law as they had made. The New York act also contains a provision, that every person purchasing shall succeed to all the rights and liabilities of the preceding holder. Judge ALLEN delivered a very able dissenting opinion. But in a subsequent case (*Leggett v. Bank of Sing Sing*, 24 N. Y. 283), where the articles provided that the stock should not be transferred until all debts due were paid, the lien was held good against an assignee taking with notice. All the judges, as far as appears, acknowledged the validity of the lien; but a minority assented, on the ground that the language used in the articles did not cover debts not due. In this case the certificate expressed the liability for indebtedness.

One of the plaintiffs' points in the present case is, that the power to regulate the manner of transfer does not include a power to impose a burden on it—to create a lien. It will be observed that this is substantially the language of the New York act, "transferable in such manner," etc. And on looking at the eighth section of the Banking Act of 1864, we find that the word *manner* is used, not only with reference to the transfer of stock, but applies to the whole of the following paragraph, and that it will not do to give it the very limited meaning contended for by the plaintiffs.

In the present cases, although the articles of association of the different banks profess to give the directors power to make by-laws, etc., no question of the sort raised in New York can arise, because the act of congress of 1864 itself, in section 8, expressly confers on the directors the general powers of making by-laws, regulating the manner of transferring stock, etc., and conducting its general business. The words in the act of 1864, sections 5 and 8, although not exactly the same as those in section 11 of the act of 1863, are the same in substance, except that the act of 1863 had given these

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powers to the association, and had not expressly provided that the directors might exercise them.

Why was the act of 1863 revised and amended so soon after its passage, by a new act substituted for and repealing the former? The comptroller of the currency, in his report in December, 1863, urges a revisal, because the act of 1863 is not symmetrical, nor clear, if even consistent, in all its provisions. He therefore recommends that it be revised, cleared of obscurities, and that the parts relating to the same subject be placed in juxtaposition, and specifies many particulars. The secretary of the treasury indorses the recommendations of the comptroller. But neither officer suggests any objection to the 36th section, or to the usage so prevalent in a large part of the Union of making such by-laws as the ones now in question. Up to that time, but one bank had been organized in Rhode Island, under the act, and one hundred and thirty-four in all. All the present defendant banks were organized under the act of 1864. The new act, as compared with the old, seems to be much improved, better arranged, and stripped of much useless verbiage, and we can understand many reasons why the provision in section 36 was omitted. It was useless; because congress had already, in other parts of the act (as also in that of 1863), used words which the text-books recognized as conferring, and which the courts had decided did confer, the power to make a by-law pledging the stock. They were rather worse than useless, because as they prohibited a transfer only in case the holder was indebted for debts due and unpaid, it seemed to imply that if the debt had not fallen due, the holder might transfer, and that in such case the bank could have no lien. And it may be supposed, further, that while the act of 1863 positively prohibited a transfer in the case of a debt due, the omission was intended to leave it in the discretion of the bank, whether it could have such a by-law or any by-law at all upon the subject; some banks might prefer not to have any. As the power is conferred by other parts of the act, we think no inference can be drawn against these by-laws from the omission of this clause in the new act; as we can suppose many other reasons for its omission, equally probable with those suggested by the defendants, and fully consistent with an intention to retain such a power in the banks.

Is it, in the next place, inconsistent with other parts of the act, or with the policy of the act? It is alleged by the plaintiffs, that the object of congress was, to break up that old practice of loaning

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upon stock, a practice which, they say, led to the creation of much fictitious bank capital and was one of the great objections to the old system. The practice of loaning upon stock was common in the old State banks of New England, and we believe many of the States. Sometimes the note contained a clause specifically pledging the stock for the loan, and sometimes not. The distinction was, that no indorser was required, and that the bank had no security but the maker and his stock. This power, though at times very convenient, was, in the hands of reckless or dishonest men, a dangerous one. Now this practice of loaning upon stock alone, congress did prohibit in the new national banks, by language very plain, but not plainer in the act of 1864 than in that of 1863. They have done it by several provisions: 1st. The act of 1863 provided, section 37, that no loan should be made on security of its capital stock, but "the same security, both in kind and amount, shall be required of shareholders as of other persons," and implies that the security must be adequate for the debt — *independent of any lien upon the stock*. In the act of 1864, section 35, there is the same provision, substantially, that they shall not loan upon security of their own stock, but the words we have put in quotation marks above are omitted, as entirely unnecessary. 2d. As the principal danger in all banks is from mismanagement by directors, they have required, section 9, each director to make oath, that he is the *bona fide* owner of his stock, and that it is not pledged or hypothecated for any loan or debt. This provision is much more strict than the corresponding one in section 39 of the act of 1863, which only required him to swear that his stock was not pledged for any debt due to his own bank. That a general pledge by by-law would not be considered as a hypothecation. See *Ex-parte Wilcocks et al.*, 7 Cow. 401. 3d. And the creation of fictitious capital was further guarded against by section 35 of the act of 1863, by which the whole amount of the debts due from all the stockholders was limited, and in the act of 1864, by section 29, which limits the liabilities of a person or firm.

The implication contained in section 8, by which the power to make loans on personal security is given, would seem at first sight to mean that the banks should loan on the *credit of the person*. But when we look at the history of that clause, we should probably conclude that that was not its meaning. The lines in section 11 of the act of 1863, "to carry on the business of banking by discounting notes, bills and other evidences of debt; by receiving deposits;

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by buying and selling gold and silver, bullion, foreign coin and bills of exchange ; by loaning money on real and personal security," etc. (see the act of 1863), are almost word for word the same with the New York bank act of 1838, chap. 260, § 19. Edmonds, 4, 132. After specifying the power to discount all sorts of business paper, which by the usage of banks is generally done on the credit of the person, it goes on to authorize loans on real and personal security. The connection shows that personal estate was meant, and the usage of the New York banks of loaning on pledge of stocks is well known. In the act of congress of 1864 they have retained the clause substantially, but omit the word *real*, leaving us, however, still to consider personal security as meaning personal estate — excepting, of course, its own stock — and not personal credit. In the State of Connecticut the legislature had taken a similar precaution against fictitious capital and loans on stock alone. They provided (Rev. Stat., title 3, § 226) that "no bank shall make any loan or discount on pledge of its own stock." And in *Vansandt v. Middlesex Co. Bank*, 26 Conn. 157, the supreme court of that State take the same view of the provision we have here taken. "We are fully satisfied (say they) that the law does not by fair construction embrace a case like the present, where paper was discounted by a bank for the benefit of a person who had no interest in the stock in question, not on a specific pledge of the stock, but on the personal security of a party who was a stockholder, and had only previously pledged his stock generally for his future indebtedness or liability to the bank. Such discount cannot be said to be made on a pledge of the stock." In that case the bank claimed a lien, and it was so expressed in the certificate. The lien was held good against the plaintiff, who was assignee for the benefit of creditors.

In the case now before us none of the discounts were made for Mr. Waterman, the stockholder.

These considerations show very plainly that congress did intend to break up the old practice of loaning on stock alone, without an indorser, and to require the same security of a stockholder as in other cases, independent of his stock ; but they do not show that congress intended to prohibit the banks from providing, as a measure of prudence and precaution, that if other securities, deemed good at the time of making the loan, should fail, they might then resort to the stock. And having effectually prevented the introduction into the new banks of the former dangerous practice of loaning

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on stock alone, it may well be considered that congress intended to allow them to retain a lien on the stock, in addition to the securities required in other cases. Restricted as the power is, it could not only lead to no danger, but would in fact promote the credit and safety of the new institutions.

The only doubt expressed in the authorities is, whether such a by-law would be good against a creditor or purchaser for value without notice. Some of the cases seem to have been decided upon their particular equities, some upon the form of the certificate, but many of them recognize the power to make such by-laws to affect third persons, provided proper notice is given in the certificate, or otherwise where the provision is made by charter, it seems to stand upon stronger ground.

The doctrine laid down by a great number of the authorities is, that where there is a power, either to the association or its directors, to regulate the transfer of stock, or to regulate the manner of its transfer, they may require by by-law the transfer to be made on the books, and in that case the title of a purchaser before entry on the books, although good as between him and the vendor, is not a legal, but a mere equitable title, and, being only an equity, will be subject to the prior equity of the bank. The supreme court of the United States, in *Union Bank v. Laird*, 2 Wheat. 393, laid down this as the law. The charter provided that the stock should be transferable only on the books according to such rules, etc., and that all debts due should be paid before transfer. The court held that no person could acquire a legal title except by a transfer according to the rules, and if any one took an equitable assignment, he took it subject to the right of the bank, of which he was bound to take notice. In *Stebbins v. Phenix Ins. Co.*, 3 Paige, 361, by the charter the stock was assignable according to such rules, and subject to such regulations and restrictions as the directors should establish. A by-law declared that no transfer should be valid unless made on the books. The chancellor held that the purchaser, before recording, took only an equitable title, subject to any prior equity of the company. See this case commented on by Judge ALLEN in *Bank of Attica v. Manufacturers and Traders' Bank*, 20 N. Y. 512. In *Vansands v. Middlesex County Bank*, 26 Conn. 144, the suit was by an assignee (or trustee, as called in Connecticut), for the benefit of creditors. There was no lien by charter or by-law, but a form of certificate had been early adopted, expressing that the stock was held subject to indebt-

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edness to the bank, but there was no record of its adoption. The court held (according to previous decisions in Connecticut) that the stock not having been transferred on the books as required, the assignee took no legal title; he took the title of the assignor and no more; an equitable title subject to the prior equity of the bank. And in *Mech. Bank v. New Haven Railroad Co.*, 13 N. Y., or 3 Kern. 622, 624, 626, by charter the stock was transferable *in such manner* as by-laws should direct, the by-laws provided, and the certificate expressed, that it was transferable on the books on surrender, etc. The court, after a very full examination of the nature of bank stock and certificates, and comparing the latter with bills of lading, exchequer bills, etc., say the corporation has the right so to frame the certificate that it shall not be negotiable in the commercial sense, so as to give the purchaser a title superior to the vendor (623), but that this would not prevent the owner from selling outside, so that the vendee could acquire in equity the equity of the vendor. The case of *Fisher et al. v. Essex Bank*, 5 Gray, 373, was a question between a vendee who had not perfected his purchase on the books, and an attaching creditor. By charter the stock was transferable only at the bank on its books. Chief Justice SHAW, after a full consideration of the nature of this sort of property, and of the certificate given for it, holds that this mode of transfer ought not to be considered as merely for the protection of the bank, but that the weight of authority is greatly in favor of the doctrine that the legal title does not pass until transferred on the books, and so decided after reviewing a great many cases.

Anciently, this lien seems to have been upheld as a sort of set-off; and the case of the Hudson Bay Company, as reported by Strange, 1, 645, was decided on that ground. But the same case in 2 P. Wms. 207, is put on the ground of the validity of the by-law. And Cooke (Bankrupt Laws, 1, 582, 4th ed.) says the former doctrine (set-off) was exploded, but cites the case from P. Wms., and the ground there taken, as undisputed law. See, also, 1 Abr. Eq. Cases, 9. In *St. Louis Perpet. Ins. Co. v. Longfellow*, 9 Mo. 153, the court likens it to a case of set-off. In *Waln's Assignee v. Bank of N. America*, 8 S. & R. 73, the bank took that ground, but the court do not decide upon it.

There is no dispute in the present case, but that the loans were made *bona fide*, on what was at the time considered good personal

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security, and without any intention or supposition that they would ever be obliged to rely upon the stock for security.

It was claimed for the defendants that the opinion of the comptroller of the currency, as being the officer appointed by congress to carry the act into effect, was entitled to great weight. If congress had expressly empowered him to recommend a prescribed form, this argument would perhaps have been entitled to more consideration. In the language of the supreme court (*Edwards, Lessee, v. Darby*, 12 Wheat. 210), his opinion may be entitled to respect, but he is himself bound by the law, and has no power to make or alter, and his constructions are *prima facie* only, subject to be overruled by the proper judicial tribunals. In 12 Wheat. 210, cited by the defendants, where the court observed that the construction put upon a law by commissioners who were acting under it, was entitled to great credit, their construction had acquired additional force from being acquiesced in or recognized by the legislature. The fact that the comptroller recommended these forms may, however, have this weight, that as he had recommended a revision of the act of 1863, on the ground (among others) of inconsistent provisions, this recommendation shows he did not think there was any inconsistency between the publication of loans on stock, and the banks retaining a lien on stock. Nor do we attach much weight to the reference, which the plaintiffs give us, to the Congressional Globe, 1863-4, page 1391, stating the rejection of an amendment.

It is claimed by the plaintiffs that the by-law was not in either case adopted by competent authority; that it must be adopted by the whole board of directors, and not by a mere majority.

We understand the law to be settled, that in case of a definite body, like a board of bank directors, a majority must be present at a regular meeting, or at a special meeting notified according to by-law, if there be any, or otherwise reasonably notified to all the members (excepting perhaps cases of absence at a distance) without fraud or attempt at surprise, and at such meeting a majority of those present can act for the whole. 2 Kent's Com. (side page), 293; Dana's Abr. 5, 150; *Sargent v. Webster*, 13 Metc. 497; *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124, 137; and the meeting will be presumed to be regular unless the contrary appears. *Sargent v. Webster*, 13 Metc. 497.

If the claim of the plaintiffs means that there had been no by-law made, giving a majority power to act for the whole, and that a

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majority would have no such power without a by-law, we have only to repeat the articles of association which were made before the by-laws, and which provide that a majority shall be a quorum. In the latter case it was contended that a majority was not sufficient.

The fact that the legislature of Rhode Island have been in the habit of establishing such a lien by special provision in their charters we do not consider affects the present question. It was probably done *pro majore cautela*, and to avoid the doubts which have been raised as to creditors and purchasers for value. Nor do we consider that the specific grant of power in this case abridges the general power incident to corporations. It is in fact so broad that it can hardly be called specific.

Two of the cases present questions not involved in the others. In the case of the Bank of Commerce the by-law was entered at a meeting when only three directors were present, "but the provisions of said by-law * * were previously considered, and assented to by at least a majority of the full board of directors in their official capacity at previous regular board meetings, as and for a by-law of the bank;" all the directors knew of its existence, and deemed it to be a by-law, and it was frequently referred to as a by-law at regular meetings when a majority were present, and considered by them in making discounts as an additional protection, etc. We think there is enough in the agreed statement of facts to show that it was actually adopted by a majority present at one and the same meeting, although not then entered. And although the by-law does not expressly require the transfer to be made at the bank, or on the books, it can make no difference as between the parties to the present case. Even if there was no record, or the record was deficient, we consider it settled by the authorities that the enactment of a by-law need not necessarily be in writing, but it may be inferred from facts proved. See Angell & Ames on Corp., §§ 238 and 328, and a very strong authority in *Union Bank of Maryland v. Ridgely*, 1 Har. & Gill. 418; also *Reuters v. Telegraph Co.*, 6 Ellis & Black. 341. But the authorities go farther, and hold that even without a by-law a regulation, practice or usage to this effect is good between the parties and voluntary assignees. *Waln's Assignee v. Bank of N. America*, 8 S. & R. 73. And in *Vansands v. Middlesex County Bank*, 26 Conn. 144, before cited, the bank claimed that the adoption of the form of certificate, and usage under it, was sufficient proof of a regulation; and also that their usage, known to the stockholder,

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not to permit transfer by a person indebted, was a sufficient justification to the bank for refusing to transfer. The court said these positions were strongly supported by the cases, but they decided for the bank on other grounds. We consider that the stockholder, Mr. Waterman, to whose rights and no more the plaintiffs succeed, was bound to know the usage of the banks in which he was a stockholder, and that if any of his paper was discounted at such bank for himself or others, it was subject to this claim. In one of the banks he was himself a director. It is admitted in the present cases that the plaintiffs knew of the banks' claim to the lien when they took the assignment.

We consider, therefore, that it is well settled by reason and authority, that the power to make by-laws to regulate the management of the business of the association is sufficient to justify a by-law creating a lien on the stock. That the power to regulate the transferring or manner of transferring stock is sufficient to authorize a by-law creating such a lien. That the power to regulate the transferring or manner of transferring of stock is sufficient to authorize a by-law that the stocks shall be transferable only at the bank, or on the books; and, in that case, until such a transfer, the purchaser would take only an equitable, not a legal title, and subject to any claim of the bank, by charter or by-law, or valid usage, or agreement. That a majority, at a regular or legally called meeting, when a quorum is present, is sufficient to enact by-laws. That a by-law informally adopted may be subsequently ratified, and without record of adoption, may be proved by the usage and acts of the bank, and parties dealing with it.

In the case of the American Bank, the facts are as follows: Under their State charter the directors were to be not less than nine, nor more than thirteen in number, and the majority of the number elected made a quorum. At the last election under the State charter, in December, 1864, they elected twelve, two of whom never served. The articles of association, dated June 6, 1865, are signed by the ten acting directors, and provide that the board of directors shall be twelve in number, and that the regular annual election shall be in January. The bank was fully organized as a national bank August 1, 1865, and the first election under the act of congress was held in January, 1866. In the statement of facts of the case, it is agreed that "in the interim between the conversion * * and the annual election in January, 1866, the said ten

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acting directors of the American Bank, having been appointed by the stockholders of said American Bank, authorizing the conversion, to act as directors of said American Bank until the regular annual election," etc., the said ten directors took the oath specified in section 9 of the act of congress. The agreement of the stockholders of the State bank, signed May 1, 1865, authorized their directors, or a majority, to convert the bank into a national bank, and do every thing necessary for that purpose. But they went on farther, and, in the latter part of the instrument, appointed twelve directors of the (to be) national bank. They were still a State bank, and, as such, had no right to appoint directors for the new bank. The act of congress gives them no such right, but simply provides (§ 44) that "the directors aforesaid [of the State bank] may be the directors of the association until others are elected or appointed in accordance with the provisions of this act." As soon as organized as a national bank, they might (§ 10) have met and chosen directors; but they did not choose any until January, 1866. Who were then the directors at the time of the adoption of the by-laws August 21, 1865? By the agreed statement of facts, it appears that the ten acting directors of the State bank acted as the directors of the national bank. But the articles of association under which the new bank was organized, and which are referred to, and made a part of the statement of facts, provide that the number of directors is to be twelve. This shows their intention that a full board of directors is to be twelve; and the fact of their electing the twelve old directors, although not a legal election, is still of some force, as showing that they did not then consider there was any vacancy in their old board. In all cases where an act is to be done by a corporate body, or part of a corporate body, and the number is definite, it has been held that a majority of the whole number is necessary to constitute a legal meeting; and that, if the actual number is reduced from any cause, the number necessary to constitute a quorum remains the same; but that, at a legal meeting, a majority of those present may act. 2 Kent, 293; *Cahill v. Kalam. Ins. Co.*, 2 Doug. 124, 137; note to *Ex parte Wilcocks et al.*, 7 Cow 401; *King v. Bellringer*, 4 Term R. 810; *King v. Miller*, 6 id. 268. We consider that, in the case of the American Bank, this rule must apply, and that a majority of the number twelve was necessary to constitute a legal meeting; and that, therefore, the alleged by-law was not legally adopted. In this case there is no question raised as

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to inferring the adoption from usage or acquiescence, or as to claiming a lien in any other mode.

Judgment for the defendants, except in the case of the American National Bank.

STATE v. BRIGGS.

(9 R. I. 361.)

Evidence — husband and wife.

The testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, provided that no use can afterward accrue therefrom in any direct proceeding against either of them. But a husband or wife objecting to give such testimony will be entitled to the protection of the court.

INDICTMENT against the defendant for procuring an abortion on one Mary Jane Fisher. At the trial of the indictment before Mr. Justice BURGESS and a jury, at the March term of the court of common pleas for the county of Providence, 1868, a verdict of guilty was returned by the jury, whereupon the defendant alleged exceptions, the substance of which are stated in the opinion of the court.

B. N. & S. S. Lapham, for defendant.

Sayles, attorney-general, for the State.

DURFEE, J. The defendant was convicted in the court of common pleas on an indictment for procuring an abortion on one Mary Jane Fisher. The case comes up on a bill of exceptions for alleged erroneous rulings of the court below. The first two exceptions are based on the following grounds, to wit: That the said Mary Jane Fisher was, at the time of the alleged offense, a single woman, having never been married; that she afterward intermarried with one Edwin A. Hacket; that said Hacket was the person by whom she was got with the child for whose miscarriage she was operated on, that said Hacket employed the defendant to perform the operation, and came to him with the said Mary Jane for the purpose of having

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it performed; that on the trial of the defendant in the court below the said Hacket and his wife were called on as witnesses for the government, and admitted to testify against the objection of the defendant — the objection being that the testimony of each of them would tend to criminate the other of an indictable offense — that is to say, her of the offense of fornication, and him of participation in the offense for which the defendant was indicted.

The question as to how far the testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, is not satisfactorily settled by precedent. In the case of *The King v. Cliviger*, 2 Term, 263, it was thought that such testimony was inadmissible from reasons of public policy, to avoid dissensions between husband and wife. That was a case of settlement, where a marriage in fact had been proved, and, the husband having given testimony denying a previous marriage, it was held that the first wife could not be called to prove the same, as it would tend to criminate him in respect of two crimes — bigamy and perjury. But in two cases subsequently decided, where the question was the same, except that the husband had not given testimony denying his previous marriage, it was held that the first wife was a competent witness to prove such previous marriage. *The King v. All Saints*, 6 M. & S. 194; *Rex v. Bathwick*, 2 B. & Ad. 639. In these two cases, the rule declared in *The King v. Cliviger* may be regarded as having been qualified, at least so far as to recognize the competency of husband and wife as witnesses in collateral cases, where the testimony of the one of them is called as a witness can criminate the other only when connected with other evidences. Indeed, the language of TENTERDEN, C. J., *Rex v. Bathwick*, is consistent with the admission of such testimony collaterally to any extent, provided that no use can afterward accrue therefrom in a direct proceeding. See Roscoe's Crim. Ev. 118 and 144; 1 Greenleaf's Ev., § 242, and 1 Phillips on Ev. 84, 85, in which, however, it is stated that in *The King v. Glead*, 2 Russ. on Crimes, 983, the rule of exclusion was applied, though *Rex v. Bathwick* was cited in the case. And see, also, remarks of EARLE, J., in *Stapleton v. Croft*, 10 Eng. L. & Eq. 461, 462. In the case of the *State of Wisconsin v. Dudley*, 7 Wis. 664, on the trial of an indictment for adultery committed by the defendant with the wife of a man who had subsequently procured a divorce, it was held that the divorced husband was a competent wit-

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ness to prove his marriage with his divorced wife. In *State v. Marvin*, 35 N. H. 22, on a similar indictment, the husband testified, without objection, to the marriage and to the fact of the adultery; but, being asked if he lived with his wife at the time of the trial, answered that he did not. To this last statement the defendant objected, but the objection was overruled, and it was held, on a motion to set aside the verdict, to have been properly admitted.

We find no American decision, with the exception of the two above stated (if they can be deemed an exception), which sanctions the unqualified admissibility of such testimony in a collateral proceeding. It has been decided in four different States, that on the trial of an indictment against a man for adultery, the husband of the woman with whom the crime is alleged to have been committed is not a competent witness to prove the fact. *State v. Gardner*, 1 Root (Conn.), 485; *State v. Welch*, 26 Me. 30; *State v. Wilson and Wagner*, 31 N. J. 77; *Commonwealth v. Sparks*, 7 Allen, 534. In the last-named case, MERRICK, J., in delivering the opinion of the court, said: "It has never been determined that a husband or wife is admissible as a witness in any collateral proceeding, to testify directly to the commission of any criminal act of the other. Nor ought such testimony to be received in any proceeding or upon any trial; for, as nothing would be more likely to exasperate the parties and be the means of implacable discord and dissension between them, its admission would be a violation of that principle of public policy upon which the general rule of their exclusion as witnesses against each other is founded." And see, also, *Canton v. Bentley*, 11 Mass. 441; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Stewart v. Johnson*, 3 Harrison (N. J.), 89; *People v. Horton*, 4 Mich. 87; Mich. Dig., § 1665.

In *The State v. Wilson and Wagner*, 31 N. J. 77, it was held that the husband was not a competent witness on the trial of an indictment against a man for adultery with his wife, even after the acquittal of the wife, who had been jointly indicted with the accused.

We may remark of the class of cases to which the case last cited belongs, that it may be doubted whether, as a matter of fact, it would often happen, after the adultery of the wife, that there would be much marital harmony to be endangered by the testimony of the husband against her paramour.

Some of these cases recognize the distinction suggested in the cases of *Rex v. All Saints* and *Rex v. Bathwick*, between testimony

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which is directly criminative, and that which is criminative only when connected with other testimony, a husband and wife being deemed competent witnesses to give testimony, in collateral cases, which relate to the other, when it is of the latter, but not when it is of the former description. But upon principle we find no satisfactory ground for the distinction. The supposed disqualification of husband and wife to give, in collateral cases, testimony directly criminative of each other, is said to rest on the policy of avoiding dissensions between husband and wife; and, if so, the disqualification ought to be complete, for such dissensions, differing only in degrees of virulence, would be likely to result from testimony which tends to criminate, as well as from that which is directly criminative. There are logically only two alternatives, either to exclude the testimony entirely, or to admit it to any extent in collateral proceedings, provided that no use can afterward accrue therefrom in any direct proceeding. We think it the better rule, subject to such proviso, to admit the testimony. We think the language used by at least one of the judges, in *Rex v. All Saints*, and by Lord TENTERDEN, in *Rex v. Bathwick*, is open to the inference that they would have gone as far if these cases had required it. There are cases in which the interests of justice seem to require that such should be the rule. Neither can we perceive that any special mischief will be likely to result from it; for the testimony, being given in a collateral proceeding, could have effect only as information against the husband or wife, there being no contradiction between them, and there is but slight reason for supposing that the witness would *willingly* communicate under oath any information which would otherwise be withheld. Generally, indeed, it is pretty well known, either from the witness himself or otherwise, what he can testify before he takes the stand. If we accord to the witness the privilege of objecting to testify on the ground that the testimony, if given, will criminate, or tend to criminate, a husband or wife, we think that, in a proceeding which can never be used against the husband or wife, there is no sound principle of public policy which requires that we should go still further, and put it in the power of a third person, by objecting when the witness does not object, to defeat, it may be, a just claim, or escape a merited punishment.

We concur in the opinion expressed by Mr. Justice BAILLY, in *Rex v. All Saints*, that a husband or wife, objecting to give such testimony, would be entitled to the protection of the court

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The case at bar presents some peculiarities which, even if the true rule be that which is contended for on the part of the defendant, might lead us to question its applicability. It is a case in which the husband and wife were both witnesses, and both, so far as appears, willing witnesses, and in which each testified to the facts which are claimed to make the testimony of the other inadmissible. It is not, therefore, a case in which either can properly make the testimony of the other a ground for conjugal dissension; and consequently it might be urged that the case is not within the rule, as the same is contended for on the part of the defendant, inasmuch as it is not within the reason of the rule, *ratione cessanti, cessat ipsa lex*. If, however, the case is not an exception to the rule, but an example under it, it is an example which aptly exemplifies its irrationality in some of its applications.

But we think the true rule is not in accordance with the defendant's claim, but in accordance with the opinion which we have previously expressed, and that, accordingly, the testimony of Edwin A. Hacket and Mary Jane Hacket was admissible on the trial of the indictment against the defendant. We therefore overrule the first two exceptions specified in the defendant's bill of exceptions.

[The remainder of the opinion is unimportant.]

 CHASE V. THE AMERICAN STEAMBOAT COMPANY.

(9 R. L. 412.)

Jurisdiction — of State courts for marine torts — admiralty jurisdiction.

In a suit by an administrator brought under a statute of the State to recover for the loss of life of his intestate, caused by being run over by defendant's steamboat in Narragansett bay, where the defendant contended that the jurisdiction of the State court depended entirely on the saving clause in the act of congress, 1789, chap. 20, § 9, saving to suitors a common-law remedy and that this, being a right of action given by statute, and not existing at common law, was not within that saving clause; *held*, that the intention of the saving clause was to have a remedy or right of action in those courts which proceed according to the course of the common law as distinguished from admiralty proceedings, and that the action was maintainable in the State courts

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The cases of *The Hine v. Trever*, 4 Wal. 555, and the *Moses Taylor*, id. 411 stated and distinguished.

ACTION of the case, brought under the provisions of sections 16 and 21 of chapter 176 of the Revised Statutes, by the plaintiff as administrator of the estate of George Cook, late of Portsmouth, to recover \$50,000 damages, for the benefit of the widow and children of his intestate, for causing the death of said intestate on the 29th of June, 1869, by a collision caused by the negligent and careless management of the defendant's steamer *Whatcheer* on the waters of Narragansett bay, the same being a public highway.

At the trial of the case at the present term of the court for this county, before Mr. Justice POTTER and a jury, the action was dismissed on motion of the defendants, for want of jurisdiction, whereupon the plaintiff filed a motion for a new trial, which was subsequently argued by agreement in Providence county, as of the present term in Newport county.

Sheffield, for plaintiff.

Payne, B. F. Thurston and Gardner, for defendant.

POTTER, J. Action of the case brought by the plaintiff as administrator of the estate of George Cook, deceased, to recover \$50,000 damages for the benefit of the wife and children of the intestate, for causing the death of the intestate on the waters of Narragansett bay, by a collision. The action was dismissed on motion of the defendants, on the ground that the State court had no jurisdiction, and the question now comes before this court on a motion for new trial, on the ground of alleged erroneous ruling.

The declaration contained two counts, one under section 16 of chapter 176 of the Revised Statutes, which provides that if the life of any person crossing upon a public highway with reasonable care shall be lost, by reason of the negligence or carelessness of such common carrier (by stage-coach, railroad or steamboat), or by the unfitness, or negligence, or carelessness of their servants, the common carriers or proprietors shall be liable for damages for the injury caused by such loss of life, to be recovered in an action of the case for the benefit of the husband or widow or next of kin; such action for the benefit of the widow or next of kin to be brought by the administrator.

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The second is on section 21 of chapter 176 : "In all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law, had not death ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of his or her husband, widow, children or next of kin, in like manner and with like effect as in the preceding five sections provided."

The plea is the general issue.

The questions involved are, first, whether the United States courts, by the United States constitution, have exclusive jurisdiction in a case like this, resulting from a collision of vessels in the bay, or whether the State courts have concurrent jurisdiction; and, second, whether, if the State courts would have jurisdiction in a case of ordinary injury, they would have it in a case like the present, where the remedy is given by statute and was unknown to the old common law.

Origin of the acts.—The consideration of the first of these questions is necessary to throw light upon, and aid in, the determination of the second.

Before the adoption of the constitution, the State had jurisdiction over the bay and over the coasts of the sea to the extent of the marine league; Lawrence's Wheaton, 321, 933 ; 6 Dane's Abr. 359, etc. ; 8 Hag. Ad. 290, 375 ; *De Lovio v. Boit*, 2 Gallia. 398 ; see 425 ; see opinion of Mr. Justice JOHNSON in *Ramsay v. Allegre*, 12 Wheat. 614. This jurisdiction was exercised by its courts of common law. The vice-admiralty court exercised an occasional jurisdiction in cases of prize and violations of the British revenue laws. However it may have been in other colonies, here the power of the vice-admiralty court was but little regarded. The colony legislature regulated the fees of the admiralty, and imposed penalties on its officers for violating it; and by act of 1746 the superior court of the colony was empowered to issue prohibitions to the admiralty courts.

Dane, a good authority on old New England laws and usages, observing that most of the statutes, etc., were intended merely to regulate the plantation trade, the laws of which the colonies were continually violating, goes on to say that at the date of the Massachusetts charter, 1691, the admiralty jurisdiction was "exclusive on the high seas, the common highway of nations, without the territorial

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line usually a canon-shot from the shores; concurrent with the common law on the coasts between the shore and that line, and without the bodies of counties; and within them, only such admiralty limited jurisdiction the said prior statutes gave, and that was the colonial view of the subject," and after the act of 7 & 8 William III, ch. 22, to prevent frauds in trade, "the admiralty geographical sphere remained as before." Some have supposed the members of the convention who formed the United States constitution had in view this extended admiralty jurisdiction when they provided that the judicial power should extend to "all cases of admiralty and marine jurisdiction." This is not probable, because this extended jurisdiction was deemed by the colonies unconstitutional. * * * "The king's commission to the governor of New Hampshire seems to have extended to all crimes and suspected offenses and contracts, even to fresh waters and arms of rivers, etc. The colonies never admitted an admiralty jurisdiction to be legal to this extent." 6 Dane's Abr. 357, 358.

In the address of the delegates in congress in October, 1774, one of the complaints is, that the English stamp act had extended the admiralty jurisdiction "to matters arising *within the body of a county*," and authorized penalties by forfeitures to be recovered in that court. Journal, 47. And among the resolutions of congress, October, 1774, is one that "the respective colonies are entitled to the common law of England," etc. Id. 29. And in July, 1775 (Id. 190), they renew their complaint against the English government of "enlarging the jurisdiction of the courts of admiralty and vice-admiralty." And see Id. 144, etc., 152.

The colony and State have always asserted their jurisdiction over Narragansett bay, and the process of the State courts has always been served on it. By an act of the legislature, 1798, that part of the bay north of Field's Point was declared to be within the county of Providence, and southward of that point process of any county might be served.

Of course all this jurisdiction remains in this State and its courts, which has not been granted to the general government by the United States constitution.

And the State legislature has (as stated in the argument of Mr. Sheffield) at various times regulated the fisheries in the bay, the speed of steamboats, the sale of liquors, and prohibited the pollution of its waters.

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When the United States constitution provides that the judicial power of the Union shall extend to all causes of admiralty and maritime jurisdiction, is this grant of power to be interpreted by the state of the admiralty jurisdiction, as it was anciently claimed by the admiralty in England, or by the actual state of the jurisdiction in England at the date of our revolution, or by the extent of that jurisdiction as it was practiced in the colonies?

It is not necessary for the purposes of this case to go into the history of the controversy in England between the courts of common law and admiralty, which has been so fully gone into in the case of *De Lovio v. Boit*, 2 Gallis. 398, and in several cases before the United States supreme court.

So far as maritime torts are concerned, within which class the present case comes, it is admitted that the jurisdiction of the admiralty depends on the place.

So far as concerned the high seas, which were distinguished in the old English law from the narrow seas so called, and bays and arms of the sea, the jurisdiction was undisputed. But as to such parts of the arms of the sea as were within the jurisdiction of the counties, the courts of common law resisted the jurisdiction of the admiralty, and for a time, at least, entirely excluded them.

Dane says (6 Abr. 356), "According to 13 Rich. II, ch. 5, the bodies of counties includes all lands and waters within the realm of England; and the sea includes all the waters without the realm; and * * * the realm includes the narrow seas and the coast." And see Jacob's Law Dict., Bac. Abr. 1, (side p.) 623; 4 Inst. 134, 140; Comyn, Admiralty, E. 14 and F. 2; Judge STORY, in *United States v. Grush*, 5 Mason, 300.

It is enough for the present case to state what is generally admitted, that at the time of our revolution the common-law courts had at least a concurrent jurisdiction in England with the admiralty, over marine torts committed in bays and arms of the sea.

What then is the effect of the act of 1789? The language is, the district court shall "have *exclusive original* cognizance of all civil causes of admiralty and maritime jurisdiction;" "saving to suitors in all cases the right of a common-law remedy, when the common law is competent to give it."

Is the word "exclusive" here used in reference to the State courts, or to the other United States courts? If the question were a new question, it might be reasonably argued that the words in their con-

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nection, *exclusive original*, mean that the original jurisdiction in such cases is in the district, exclusive of the circuit court. And such is Chancellor KENT's opinion. Kent's Com. 1, (side p.) 304, note.

In several places in the act, where it is intended to exclude the State courts, the words "exclusive of the State courts," are carefully used. Seizures under the laws of trade, they being United States laws, would, of course, follow the jurisdiction of the United States courts.

But the supreme court of the United States have construed this word *exclusive* to refer to the State courts. It is important to consider that the jurisdiction of the State court depends on the constitution and not on the act of congress; if congress has not the power to give the United States courts exclusive jurisdiction, then this clause is entirely unnecessary; for the State courts would have the jurisdiction without it; and if the constitution, either expressly or by implication, vests the exclusive jurisdiction in the United States courts, congress could not give any portion of it to the State courts. And even if the word *exclusive* was used by congress purposely to exclude the State courts, then the question arises, what does it mean to exclude? Does it only mean to exclude the State courts from exercising admiralty jurisdiction, or does it mean to exclude them from exercising any jurisdiction whatever over certain classes of cases? For example, if a policy of marine insurance is a maritime contract, is the State court therefore excluded from all jurisdiction over such a policy?

Salt water, where the tide ebbs and flows, may be within admiralty jurisdiction, and admiralty courts may therefore have jurisdiction over offenses committed on it; but suppose two citizens of a State step out into shallow water and fight a duel, are they not punishable by the laws of the State? Chief Justice MARSHALL answers the question in the affirmative. *United States v. Bevans*, 8 Wheat. 336, 339. So *pari ratione* of an assault or other offense.

In the trial of Bruce before the admiralty court for murder in Milford Haven, the opinion of the twelve judges was taken as to the jurisdiction. The jurisdiction was sustained, but most if not all of the judges seemed to think the common law had a concurrent jurisdiction. 2 Leach's Crown Cas. 1093, case 353, cited in *United States v. Bevans*, 6 Wheat. 372, note. And HALE (2 P. C. 12) lays it down that the king's bench had concurrent jurisdiction of

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felonies on the narrow seas, because, though out of the body of a county, they were within the realm.

So in cases of civil actions for torts: *e. g.*, collision, if on the high seas or in harbor, the admiralty court may have jurisdiction to give damages for it, on account of its taking place on tide-water; but it is believed that the courts of common law have always exercised jurisdiction in these cases. The cases which support the admiralty jurisdiction in this and other classes of cases, assert that jurisdiction in opposition to the common-law decisions which excluded the admiralty, and do not undertake to assert an exclusive jurisdiction over that whole class of cases.

Suits for collision on the Thames were sustained at common law, because held to be within the body of a county. *Violet v. Blague*, Cro. Jac. 514. And see 2 Hale's P. C. 16. In fact, the admiralty jurisdiction was denied there.

The supreme court of the United States, in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 390, say: "The common-law courts exercise a concurrent jurisdiction in nearly all the cases of admiralty cognizance, whether of tort or of contract, with the exception of proceedings *in rem*."

Judge STORY, in his Commentaries on the Constitution (edition of 1833), vol. 3, § 1666, note, says, the admiralty jurisdiction "is exclusive in all matters of prize, for the reason that at the common law this jurisdiction is vested in the courts of admiralty to the exclusion of the courts of common law; but in cases where the jurisdiction of the courts of common law and the admiralty are concurrent (as in cases of possessory suits, marines' wages, and *marine torts*), there is nothing in the constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is as little ground upon general reasoning to contend for it. The reasonable interpretation of the constitution would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. * * * This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction." And Chancellor KENT holds to the same doctrine. See Kent's Com. 1, (side p.) 395, 400, citing the Federalist, No. 82, and Judge WASHINGTON's appro-

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val of it, in *Houston v. Moore*, 5 Wheat. 1. And in oft cited cases of *De Lovio v. Boit*, A. D. 1813, 2 Gallis. 398, 445. Judge STORY, after excepting prize cases, says, that "in all others the common law has now acquired or claimed a concurrent jurisdiction." Judge STORY was in that case asserting the concurrent—not exclusive—jurisdiction of the admiralty courts. And see pp. 422, 476, etc.

If because admiralty has *a* jurisdiction in these cases, common-law courts therefore have none, it would sweep into the Federal courts a very large portion of the litigation of the sea-board states.

These considerations may seem not pertinent to the case on hand, but they are of importance in determining what is the meaning of the saving clause in the act of 1789. The defendants contend that the jurisdiction of the State court depends on this clause, and on this alone; but it is confined to the common-law remedies as they existed before the adoption of the United States constitution; and that therefore the act giving an administrator the right to recover damages for injury to a family by a death caused by the wrongful act of another, being a new right of action and not existing at common law, is not within the saving clause, and therefore the State court has no jurisdiction.

If, as we have said, the jurisdiction of the State courts does not depend entirely on the act of congress, then this clause would not affect the question of concurrent jurisdiction, except as showing the sense of congress that the word *exclusive* was not intended to take it away, and should not be so construed.

We may well admit there are whole classes of cases where the Federal courts have jurisdiction entirely exclusive of State courts, namely, cases of prize, seizures under the United States revenue laws, and cases arising under United States statutes where the statute gives them the jurisdiction; cases in which the United States constitution expressly gives them jurisdiction, and other cases in which by implication their jurisdiction is exclusive or may be made so by congress.

If, in any of the cases in which the State courts retain jurisdiction, there is danger of our foreign relations being affected, congress may provide for their removal into the Federal courts. See *McLeod's case*, Dec. Joint. Com. 314, 489, 836.

But even if the jurisdiction of the State courts does depend on this proviso, what is the meaning of it? Is it confined to common-law remedies as they actually existed in 1789, and does it prevent

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the States from granting any new right or remedy to be pursued according to the course of the common law ?

The reasonable construction, as it seems to us, is that it intends to vest in the United States courts the *whole* jurisdiction the admiralty courts of England and the colonies exercised, or generally, the whole admiralty jurisdiction (by whatever rule defined), exclusive where it was exclusive and concurrent where it was concurrent, but that in these latter cases the courts of common law could not proceed by admiralty process ; in other words, that if the suitor chose to resort to an admiralty remedy he must do it in an admiralty court. Mr. Justice MILLER, in the opinion of the United States supreme court in *The Hine v. Trevor*, 4 Wal. 555, and Mr. Justice FIELD, in *The Moses Taylor*, Ibid. 411, while holding that the admiralty jurisdiction was exclusive in the Federal courts, place the ground of those decisions on the fact that the proceedings provided for in the state laws, which were declared void in those cases, were admiralty proceedings, were proceedings *in rem*. Mr. Justice FIELD observes that the remedy by the State law was in no sense a common-law remedy. The vessel was made defendant without mentioning the owners, etc. And he well observes that it could not have been the intention of congress to give the suitor *all* such remedies as might afterward be enacted by State statutes, for that would enable them to make the jurisdiction concurrent in all cases, and so defeat the exclusive jurisdiction of the Federal courts. And Mr. Justice MILLER observes, "It is not a remedy in the common-law courts that is saved, but a common-law remedy. A proceeding *in rem* is not a common-law remedy," etc. The objection here is, not that a new right was given, but that it was to be enforced by the process peculiar to the admiralty courts.

In *Waring v. Clarke*, 5 How. 441, 457, Mr. Justice WAYNE, in delivering the opinion of the majority of the United States supreme court, and replying to the argument that the admiralty jurisdiction was confined to the cases in which it formerly existed in England, says that the construction would, in effect, take away from the courts the interpretation of the provision, and would prevent all future legislation on the subject, and therefore this limitation could not have been intended.

The argument seems to us to be equally strong, that congress could not intend by this proviso to confine the remedy to the common law as it anciently existed, and to prevent the extension of a

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right or all alteration of process or form of remedy. If so, what would be the effect in New York, and those States which have, by their new codes, abolished all the old common-law forms and remedies?

The intention, therefore, must be, giving the clause a liberal construction, to save the remedy or right of action in those courts which proceed according to the course of the common law as distinguished from the course of admiralty, and there is nothing in the opinions we have cited, against this construction.

Judge NELSON, in the United States supreme court (*N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. 344, 390), says: "The saving clause was inserted probably from abundant caution lest the exclusive terms in which the power is conferred on the district courts might be deemed to have taken away the concurrent remedy which had before existed. This leaves the concurrent power *where it stood at common law.*"

And the United States supreme court, in *The Eagle*, 8 Wal. 15, in speaking of the saving clause in the additional act of 1845, which saves "to the parties the right of a concurrent remedy at the common law where it is competent to give it, and any concurrent remedy which may be given by the State laws," hold that this saving clause "is in effect the same as in the act of 1789."

We have here the opinion of the whole court without dissent, giving a construction to the saving clause in the act of 1789, agreeing with the construction we have given to it, and which we consider the most reasonable. *A new trial must therefore be granted.*

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(9 R. L. 442.)

Evidence—foreign laws—proof of.

A person offered as a witness and expert in foreign law may state the written law without producing it, and he may produce a copy of the statutes, or code of the foreign country, and refer to the same, for the purpose of refreshing his recollection as to the law.

A Spanish lawyer, who had practiced law in Cuba, was allowed to testify from a printed copy of the Spanish code of commerce, as to the laws regulating special partnerships in Cuba.

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THESE were two actions of assumpsit, one brought by Henry F Barrows against the defendants, to recover the sum of \$8,494.39, alleged to be due on book account for goods sold and delivered, and the other by the Meriden Britannia Company, upon a promissory note for \$8,467.82, made by the said J. F. Downs & Co., and also to recover the sum of \$1,142.09, alleged to be due on book account for goods sold and delivered.

Service of the writ in each of these cases was made solely upon William C. Downs, described therein as one of the copartners of the firm of Joseph F. Downs & Co., the said Joseph F. Downs not being to be found within the State.

The cases were tried together by consent, and a jury trial having been waived, were submitted to the court in fact and law. The material facts are stated in the opinion of the court.

James Tillinghast and Blodgett, for plaintiffs.

Payne, for defendants.

POTTER, J. These cases were tried together by consent. The debts are admitted, and the claim is against William C. Downs, as a general partner of the firm of Joseph F. Downs & Co., doing business in Havana.

As the goods were ordered by letter from Havana, or personally in New York, and were to be paid for in New York, the contract is to be considered as made in New York.

The plaintiffs rely on evidence that said William, while on a visit to this country, held himself out as a partner, and a general partner, in the firm.

The defendant denies these representations, and contends that he was only a special partner in the Havana firm, and under the Spanish law not liable as a general partner.

He testifies to a special partnership existing between him and Joseph for several years previous to 1866, the terms of which were, however, not reduced to writing until April, 1866, a copy of which he produces, and he also offers the evidence of A. F. Bramoso, a Spanish lawyer formerly of Havana, but now of New York, that said verbal special partnership was valid there. Said Bramoso produced a copy of the Spanish Code of Commerce (edition of 1828), which he says is the code now in force in Cuba, and testified from it as to the laws regulating special partnerships in Cuba.

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Said Bramoso testified that there was no common law in Cuba; and afterward explained, that he intended by this that they had no common law composed of decisions of courts, etc., according to what appeared to be his idea of our common law.

The plaintiffs object to the admission of a copy of the agreement of April, 1866, as it appears that the original could be produced. This is a valid objection. But the written agreement, if produced, could affect but a small portion of either claims (the greater part of each debt being incurred before its date), and as we consider the fact of previous special partnership sufficiently proved, the partnership would be held to continue, until its termination is shown by some evidence.

The plaintiff also objected to the admission of the Spanish Code as not sufficiently proved.

The courts have been for some time relaxing the rigor of the ancient rules in relation to the proof of foreign statutes.

In *Ennis v. Smith*, 14 How. 400, a copy of foreign statutes, received through the agency of the Vattemare system of exchange, was admitted. In *Jones v. Moffit*, 5 S. & R. 523, a copy of Irish statutes, sworn to by a barrister as having been received from the king's printer, was received.

The United States supreme court, in *Talbot v. Seeman*, 1 Cranch, 19, lay down the rule that the laws of a foreign country, designed for the direction of its own affairs, are not to be noticed, unless proved as facts; and in that case they admitted an edict of France, which had been promulgated by the United States government. And in *Church v. Hubbard*, 2 Cranch, 187, they say that the sanction of an oath is required, unless verified by some other high authority entitled to equal respect with an oath.

In that case, a Portuguese law and its translation were certified by the United States consul at Lisbon. He did not testify to them on oath. The court says that "they are not verified by an oath," and that it was not a consular function to certify to laws; and imply strongly, that if there had been testimony on oath, it would have been admitted. "It is impossible," says C. J. MARSHALL, "to suppose that this copy might not have been authenticated by the oath of the consul, as well as by his certificate." That this was the ground of that decision is stated in the opinion of the supreme court, in *Ennis v. Smith*, 14 How. 427, where the court say the copies would have been admitted in that case if they had been sworn to.

And in *Ennis v. Smith*, 14 How. 400, 426, the court hold that foreign written laws may be "verified by an oath or proved by exemplification, etc. * * * But such modes of proof as have been mentioned are not to be considered as exclusive of others, especially as codes of law and accepted histories of the laws of a country." And they say "that a foreign written law may be received when it is found in a statute book, with proof that the book has been officially promulgated by the government which made the law." *Id.* 429. In *Packard v. Hill*, A. D. 1829, 2 Wend. 411, the court rejected a copy of a statute establishing the court of consulado in Havana, produced by a witness who had purchased it in Havana, and who testified that he had practiced in that court, and that the court was governed by this law. A "book purchased in a book store, purporting to contain the laws of a State, unless published by authority, would not be admitted anywhere," etc. In the case of *Chanoine v. Fowler*, 3 Wend. 173, the edition of laws rejected did not purport to be an official edition. In the case of *Queen v. Dent*, 1 Car. & K. 97, a witness, not of the legal profession, was admitted to prove the fact as to law. But this decision is decidedly condemned. See *The Sussex Peerage*, 11 O. & F. 124, 134; and see *Vanderdonckt v. Thellusson*, 8 M., G. & S. 824.

In the case of *Lacon v. Higgins*, A. D. 1822, 3 Stark. 178, ABBOTT, C. J. (Lord TENTERDEN), admitted a copy of the French Code, produced by the French consul, and sworn to by him as the one used and acted on by him, and purporting to be printed at the Royal French printing office, where the laws were printed by authority. The decisions seem to have very much conflicted; sometimes (as generally in New York) the written law being rejected, unless proved by exemplification. And see *Richardson v. Anderson*, in note to 1 Camp. 64; see, also, the new English statute, 15 & 16 Victoria, ch. 96, § 7.

Chancellor KENT, in *Brush v. Wilkins*, 4 Johns. Ch. R. 506, admitted the law of Demerara, as to succession and wills, to be proved by a witness. The report does not indeed say that it was statute law.

The decisions of a later date, however, have evidently tended to allow the statute laws of a foreign State to be verified, or the effect and construction of such law to be proved, by the oath of a witness.

In the *Sussex Peerage case*, 1844, 11 O. & F. 85, Dr. Wiseman was called as a witness to prove the laws of marriage at Rome, and

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referred to a book containing the decrees of the council of Trent as regulating them. The judges of the committee of the House of Lords expressed their opinions severally. Lord BROUGHAM: "The witness may refresh his recollection by referring to authorities," etc. Lord LYNDEHURST, lord chancellor: "The witness may thus correct and confirm his recollection of the law, though he is the person to tell us what it is." Lord BROUGHAM agreed with the lord chancellor: "The witness may refer to the sources of his knowledge; but the proper mode of proving a law is not by showing a book; the House requires the assistance of a lawyer who knows how to interpret it." Lord Chief Justice DENMAN: "There does not appear to be in fact any real difference of opinion; there is no question raised here as to any exclusive mode of getting at this evidence, for we have both materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of the law. A skillful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. That was decided after full argument on Friday last (June 20), in the court of queen's bench (*Baron de Bode's case*). There was a difference of opinion, but the majority of the judges clearly held, on an examination of all the cases, and after full discussion, that proof of a law itself in a case of a foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law, and this book truly states the law,' then you have the authority of the witness, and of the book. You may have to open the question on the knowledge or means of knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony; but you must take the evidence from the witness."

Lord CAMPBELL concurred, saying: "The foreign law is matter of fact. * * * You ask the witness what the law is; he may from his recollection, or on producing and referring to books, say what it is," etc. Lord LANGDALE, Master of the Rolls, "Foreign law is matter of fact. A witness more or less skilled in it is called to depose to it. He may state it of his own knowledge, or refer to text-books or books of decisions."

Dr. Wiseman went on to testify that, by virtue of his office as

Roman Catholic bishop and coadjutor to the vicar apostolic in England, "he had jurisdiction on the subject of Catholic marriages."

The Lord Chancellor: "He comes within the description of a person *peritus virtute officii*." Lord LANGDALE: "His evidence is in the nature of that of a judge."

It was admitted.

Mr. Westlake (Conflict of Laws, § 414, note) seems to think that Lord DENMAN has overstated the result of the decision in the *Baron de Bode's case*. It might well be supposed that the chief justice ought to know what his own court of king's bench had decided, and on looking at the case in 8 A. & E., N. S., 208, we find his statement supported. A witness was offered, who testified that the feudal system in Alsace had been abolished by a decree of the French National Assembly of 1789. The decree itself was not produced. Lord DENMAN, Chief Justice, said that the rule admitting testimony of persons of science, applied not only to unwritten but to written law. The question was not only the contents but the state and effect of the written law. The mere contents of the law might often mislead. He then criticised the decisions in *Boehllinck v. Schneider, assignee*, 3 Esp. 58; *Clegg v. Levy*, 3 Campb. 166; *Millar v. Henrick*, 4 id. 155, and refers to *Lacon v. Higgins*, 3 Stark. 178; *Picton's case*, 30 State Trials, 225, 491; *Middleton v. Jarverin*, 2 Hagg. Cons. 437, 442, and says he "can perceive no distinction between proof from a copy of the law, as we find it tendered and received, and the proof now tendered." Justices COLERIDGE and WILLIAMS concurred, and gave their reasons at length. The written law itself, they say, would be of little use, compared with the opinion of a scientific person who could give the exact state of the law and its construction. Justice PATTERSON dissented, and held it necessary to produce the written law. The reasons given for his dissent go far to show the effect of the decision.

It is thus decided that an expert may state the written law without producing it. Lord DENMAN says that they decided that the proof of the law was not from the book, but from the witness; and the reasons given to bear out his statement.

And it is but one step farther to decide, as was held in the *Sussex Peerage case*, that the witness may refer to the book to refresh his memory, etc.

It is true, that in the *Sussex Peerage case* the judges were not sitting as a court; but they were acting as a committee of privilege,

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to whom it had been referred by the house of lords to inquire into the validity of a foreign marriage, and the house of lords confirmed their decision. And in the last edition of Phillips on Evidence (2428, chap. 5, § 4) the law is stated substantially in the words of that decision. See, also, *Lord Nelson v. Bridport*, 8 Beav. 527, 535, 537, 539, etc. Besides, in the case of the Spanish colonies, it is difficult to ascertain what their law is without the aid of an expert. Their law is composed, partly of the various codes of Spain, and partly of the various decrees, etc., contained in the "Recopilacion de Indias," and the various decrees of later date. Some laws are in force in Spain only; some in the colonies only; and some are general. Schmidt's Civil Law of Spain and Mexico. Historical Summary.

In the *Matter of Robert's Will*, A. D. 1840, 8 Paige, 446, Chancellor KENT relied on the evidence of an expert in relation to the laws of Cuba, for the reasons we have stated above.

In the case of *Vanderdonckt v. Thellusson*, 8 M., G. & S. 812, A. D. 1840, the court, after argument, admitted a person not a lawyer, to prove the law of Belgium as to bills of exchange. In this case it is stated in the note, that the old French Code of Commerce (without the subsequent French modifications) was in force in Belgium.

The question before the court is, not the existence of a particular statute, but to ascertain the exact state of the law at a particular date, including its construction and effect.

In this case, the evidence offered is that of a person who testifies that he has practiced law in Havana for twenty-four years; has been the consulting lawyer of one of the tribunals, and a judge; and the book to which he refers, purporting to be the Spanish Code of Commerce of 1823, is the code of commercial law in force in that island.

It seems to us that this book is admissible in this case, as showing the law of Cuba, and to support the evidence and refresh the recollection of the witness.

The book, even if exemplified under the great seal of Spain, could not of itself show that it was law at the present date; and there are many cases where the evidence of a professional person or one skilled *virtute officii* may be much more satisfactory evidence of what the law is, than the mere exemplification of the exact words of a foreign statute, which the court may not have the necessary knowledge to construe. And it seems to us, that the requiring an

exemplified copy is pressing the rule of requiring the best evidence to an extent that would often defeat the ends of justice. And for the reasons we have given, the statute alone may not be the best evidence of the actual state of the law. And there can be little danger of being imposed upon by the production of a forged or supposititious document, especially in the case of a code.

Being satisfied, therefore, that the partnership in Havana was a special one, and authorized by Spanish law, the next inquiry is, what is the liability of William O. Downs, the special partner in this case?

The orders for these goods were by the general partner, Joseph, by letter or personally. No goods were ever ordered by William except once — some ear-drops from Mr. Burrows.

Now, if the parties had remained in Havana, and the general partner had made contracts abroad by letter or otherwise, there can be no doubt but that the extent to which he could bind his copartners and make them liable for his acts would depend upon the law of the place of the partnership; the extent to which they had made him their agent, with power to bind them, would be regulated by the law of Cuba. And if the general partner himself went abroad (the special partners remaining at home), his authority to bind them would still be regulated by the law of Cuba. Westlake's Conflict of Laws, §§ 211, 222; Story's Conflict of Laws, § 320 *a.*; Savigny's Private International Law (Guthrie's edition), 190; Foelix, Droit International Privé, 2, § 311.

But the plaintiffs offer evidence to show that the defendant, W. C. Downs, was in New York in the summer of 1865, and there represented himself as a partner, and as they contend, a general partner in the firm. Of course, if he was actually a general partner, he would be liable for the whole amount.

And if he was not a general partner in fact, yet if he made such representations to these parties as to his interest in the concern, his responsibility, and his share in the profits, as to lead them to suppose he was a partner personally liable, and the goods or any portion of them were advanced on the strength of his representations, then he should be liable for all so advanced.

And this is the view we take from all the evidence in the case; that the defendant should be held liable for all the goods advanced after these representations made in the summer of 1865.

Judgment for plaintiffs for \$2,054.61 and costs.

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HOPPIN V. BUFFUM.

(9 R. L. 512.)

Corporation — election — vote by trustee of stock.

M., the pledgee of stock, standing on the books of the corporation in the name of "M., Trustee," and on which he had repeatedly voted without objection, voted thereon at an election of directors. In *quo warranto* against the officers declared elected at such election, *held*, (1) that M. was entitled to vote, in the absence of any claim by the pledgors to do so; (2) that after the election it was too late for the pledgors to ask the court to disturb the result.

INFORMATION in the nature of a *quo warranto*, filed by the petitioners to test the validity of the election held at the last annual meeting of the Providence and New York Steamship Company, which resulted in the election of the respondents with others, as directors of said company. The affidavits filed by the respective parties disclosed the following facts:

On the 27th day of December, 1866, the firm of Orray Taft & Co. deposited with Earl P. Mason, as trustee, for himself, the firm of Borden & Bowen, the firm of B. B. & R. Knight, indorsers, to the extent of \$100,000 each, of certain promissory notes to the amount of \$300,000, made by said Taft & Co., and for Charles L. Anthony, guarantor of the same, 883 shares of stock in the Providence and New York Steamship Company, then a copartnership, anticipating the grant of a charter and organization thereunder, as collateral security for said indorsements and guaranty.

At the May session of the general assembly in the following year, a charter was granted to said steamship company, and the members of said copartnership, organized thereunder, passed by-laws for the government of the corporation, and, upon the transfer of the copartnership property by the trustees thereof to the corporation, the capital stock was apportioned among the stockholders, according as their interests appeared, the said Earl P. Mason having been credited as "trustee" on the stock ledger with 883 shares of the capital stock, and having received a certificate running to "Earl P. Mason, trustee," for said number of shares, which he still holds.

The notes thus secured were overdue and unpaid, and said stock was liable to be advertised and sold, in accordance with the terms of

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hypothecation, long before the 9th day of June, 1870. Said Mason had always voted on said stock at corporation meetings prior to that day, without opposition or question, and up to said day the officers and members of said corporation had no knowledge or evidence, written or otherwise, as to said Mason's title to said stock, other than said stock ledger credit, and the certificate issued to him, evidencing the same.

The charter of said corporation provided that stockholders only were eligible as directors ; and the by-laws provided that only those stockholders should be entitled to vote at meetings as should, according to the company's stock ledger, have been holders of stock for ten days next preceding such meeting.

At the annual meeting of said corporation, held on said 9th day of June, 1870, the petitioners were nominated as candidates for directors in opposition to those of the old direction named as respondents. At said meeting, the petitioners claimed they gave notice to the officers and stockholders present, that said shares were the property of Edward P. Taft, instead of said Mason, and that they were hypothecated with said Mason as security merely, and then and there protested against said Mason's voting upon said shares for the respondents, and demanded that the votes upon a portion of the same should be given for the petitioners.

The respondents denied that any such notice was given, or that any such protest or demand was made at said meeting, or that any objection ever appeared, or was shown to said Mason's voting on said shares, other than a protest made by B. B. Knight, one of the petitioners, while the ballots were being collected, on the sole ground that he had an interest therein. The old directors, including the respondents, each of whom had 3,738 votes against 2,959 for each of the petitioners, were declared elected, and thereupon entered upon the discharge of their duties.

The petitioners claimed that, at said meeting, ballots upon said 883 shares were cast by said Mason, and counted for the respondents, and for that reason their election was illegal, and they should be excluded from further holding and exercising said office of directors.

Bradley & Metcalf, for petitioners.

E. F. Thurston and Gardner, for respondents.

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POTTER, J. In this case the material facts are, that a certain number of shares in the corporation, owned by Edward P. Taft and Cyrus Taft, were pledged to Earl P. Mason as security for debts due to himself and others; but neither the ownership nor the pledge appeared on the books of the corporation, where the stock had, from the formation of the corporation, stood in the name of "Earl P. Mason, trustee." The certificate was so issued, and he had always voted thereon, without objection, until the meeting of June 9, 1870, and voted upon them at that meeting, no objection having been made until while the votes were being counted, or as some of the affidavits say, after they were counted. It is not disputed that the votes so thrown decided the election made on that day. It is claimed, on one side, that the person who then made the protest stated that said Mason held the stock as security only. This is denied on the other side.

A person who pledges stock has the right to vote upon it until the title of the pledgee to the stock is perfected. *Case of Jacob Barker*, 6 Wend. 509. If Taft had appeared on the books as owner, and the books had shown the pledge, Mr. Taft's right to vote on the stock could not have been disputed. The object of the stock book, and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends; and for no purpose is it more important than to enable it to know who are entitled to vote in case of an election. This doctrine is recognized by many authorities expressly, and by many others impliedly. *Gilbert v. Manufacturing Iron Co.*, 11 Wend. 627; *Bank of Utica v. Smalley*, 2 Cow. 770, 778; *Kirtright v. Bank of Buffalo*, 22 Wend. 348, 362; *Fisher v. Essex Bank*, 5 Gray, 373, 380; *Hoagland v. Bell*, 36 Barb. 57, 58.

And we think that in a case of a dispute as to a right to vote, the books of the corporation are the *prima facie* evidence; at any rate, the corporation cannot be required to decide a disputed right. Of course, if the pledgor and pledgee, or the trustee and *cestui que trust*, agree that either shall represent the stock, or if the facts are admitted, that might be sufficient. Upon any other rule it could never be known who were entitled to vote, until the courts had decided the dispute. The corporation or its officers would have to decide it for the time, and it would leave the election in uncertainty.

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If the real owner wishes to have his name, or the true state of facts, appear on the books, he has his remedy in equity to compel a proper transfer, or to compel the pledgee to give a proxy, as was done in the case of *Vowell v. Thomson*, 3 Cranch's O. C. 426. But when the real owner or pledgor acquiesces for years in the control of the stock by the record owner, and without any attempt to inform the corporation of the true state of facts until a contested election occurs, and then not until the votes are being counted or have been counted, we do not think he presents a proper case to justify a court of equity in interfering with the result of the election as declared. See *State v. Lehre*, 7 Rich. (Law) 234, 256, 325. In the present case the stock stood in the name of Earl P. Mason, trustee. The books did not disclose the nature of the trust. If any other person was the equitable owner of the stock, and entitled to have it transferred to him, he should, if his right was disputed, assert it in season, and take the proper measures to enforce it. But if the trust was of such a nature that the trustee has the control and management of the property, and is to exercise his discretion concerning it, then he is the proper person to represent and vote upon it. And the corporation cannot be required to examine into the nature of the trust, with a view to decide as to the right to vote.

We have examined the cases cited by the petitioners. The cases of *Merchant's Bank v. Cook*, 4 Pick. 405, and *Scholfield and others v. Union Bank*, 2 Cranch's O. C. 115, were cases in which the transfer was made directly to the bank itself. In the first case the question was, whether the pledgor (a sheriff) was so interested in the bank as to be disqualified from serving a writ in a suit in which the bank was a party. In the second case it was held that the pledgor had a right to vote. The report does not state whether the transfer on the books was absolute or conditional; but in that case it could make no odds, as, the pledge being to the bank itself, the bank must be presumed to know that it was a pledge, although the books might show an absolute transfer. In that case an injunction was granted to stay the election.

And the case of *Vowell v. Thomson*, 3 Cranch's O. C. 428, relates only to the remedy which the pledgor has in the court of equity to compel the pledgee to allow him to vote upon the stock. In that case the stock had been transferred to the plaintiff in trust as collateral security. The court, in their opinion, refer by way of analogy to the cases relating to advowsons; and a decree was made

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requiring the pledgee to give the pledgor a proxy to vote on the stock. If the corporation books had shown the true state of facts, this could hardly have been necessary. *The judgment must therefore be for the respondents.*

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(9 R. L. 533.)

Estoppel.

If one having no title to land conveys the same with warranty to A by a deed duly recorded, and he afterward acquires a title and conveys to B, the purchaser of B is estopped to aver, that the grantor was not seized at the time of his conveyance to A, the first grantee. The after-acquired title will feed the estoppel created by the conveyance to A, and conclude the grantor and all persons claiming under him. And this, although the deed to A was a deed poll.

The right of the purchaser of A to insist on the estoppel is not impaired by admitting, in an action for the possession of the land, that A's grantor had no title when he conveyed to him.

ACTION of trespass and ejectment, for the recovery of a parcel of land on the east side of Knight street in the city of Providence. The cause came on to be heard by the court upon an agreed statement of facts, both parties having therein waived jury trial. The declaration was in the common form, and the plea the general issue, with liberty, by agreement in writing on file, to the defendant to give in evidence all matters of defense as to title by possession with the same effect as if the chapter of the Revised Statutes, "Of Title by Possession," had been specially pleaded. The facts agreed upon in relation to the title to the parcel of land in dispute were as follows:

On the 2d day of September, 1843, one George Weeden, as owner in fee, conveyed to one Silas Reynolds, in fee, with full covenants of title and warranty, the parcel of land now in dispute as part of a larger lot; and on the 2d day of May, 1845, said Weeden made a conveyance, with full covenants of title and warranty, by which he purported to convey to one Ira Paine in fee said

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parcel of land now in dispute. At the time of the making of this conveyance, said Weeden was the owner in fee of the premises therein described as aforesaid, except the parcel of land now in dispute, which was then vested in said Silas Reynolds by virtue of said deed to him. On the 25th day of January, 1847, Paine made a conveyance with full covenants of title and warranty, to one Patrick Quigley, containing the same description as in the deed from Weeden to Paine. On the 6th of August, 1866, Quigley made a conveyance with full covenants of title and warranty to one Edward Kennady, containing the same description as in the deed from Paine to Quigley. And on the 12th day of April, 1867, Kennady made a conveyance with full covenants of title and warranty to the plaintiff, containing the same description as in the deed from Quigley to Kennady.

On the 24th day of November, 1845, Reynolds conveyed to Weeden, with warranty, the parcel of land now actually in dispute as part of a larger lot, and on the 8th day of January, 1847, Weeden made a conveyance, with warranty, to Williams & Belcher, who, on the 1st day of August, 1849, made a conveyance, with warranty, to one Jesse Fillmore. On the 16th day of June, 1855, Fillmore made a conveyance, with warranty, to John K. Burrows, who, on the 12th day of July, 1856, made a conveyance, with warranty, to one George Durfee. On the 14th day of September, 1858, Durfee made a mortgage to the Mechanics' Savings Bank, who, on the 29th day of March, 1861, under powers of sale, made a conveyance to the defendant. The conveyances from Weeden to Williams & Belcher, from Williams & Belcher to Fillmore, from Fillmore to Burrows, from Burrows to Durfee, from Durfee to the Mechanics' Savings Bank, and from the Mechanics' Savings Bank to the defendant, all purport to convey the parcel now actually in dispute as part of a larger lot. All the above-mentioned deeds were recorded in the order of their respective dates.

W. H. Greene, for plaintiff.

Markland, for defendant.

DURFEE, J. This is an action of trespass and ejectment, in which the plaintiff and defendant both derive title, through intermediate grantees, from one George Weeden. In May, 1845, Weeden, having

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then no title, conveyed the land in dispute to the plaintiff's predecessor, and afterward, in November, 1845, acquired title to the same. In 1847, he conveyed to the predecessor of the defendant. The conveyances through which the plaintiff claims contain full covenants of title and warranty, and all the deeds on both sides were recorded in the order of their respective dates.

The plaintiff contends that the title acquired by Weeden in November, 1845, inured to the benefit of the prior grantee and his assigns, and entitles him to recover of the defendant.

At common law, where a person having no title, conveyed by feoffment, fine, recovery, or lease by indenture, and afterward acquired title, it was held that the after-acquired title would feed the estoppel created by the conveyance, and convert the same to an interest in the grantee, so as to conclude the grantor and all persons claiming under him. In this country, where the common-law modes of conveyance have never prevailed to any considerable extent, the same rule has been applied to conveyances with warranty under the statute of uses, the warranty being deemed to have the same efficacy, by way of estoppel, as feoffment, fine, recovery, or lease by indenture. The American cases are very fully collected in 2 Smith's Lead. Cas. (6th ed.) 723, *et seq.*, and in the ninth chapter of Rawle on Covenants. The doctrine of these cases, or of the major part of them, however, has been impugned by the American annotator of Smith's Leading Cases, and by Mr. Rawle, as based on a misconception of the English authorities and as erroneous in principle, — the warranty being, in their view, effectual only by way of estoppel or rebutter against the warrantor and his heirs, but inoperative on the after-acquired estate, — and, also, as inconsistent, where applied to the prejudice of a *bona fide* purchaser for value without notice, with the spirit and purpose of the recording acts of the several States. The argument in support of these views is certainly very strong, if not theoretically unanswerable; but the doctrine impugned has been so often and so fully recognized in the courts, and repeated in the text-books, that we feel bound, out of regard for the security of titles, to follow the precedents. The argument derived from the recording acts was particularly urged in *White v. Patton*, 24 Pick. 324, and in *Jarvis v. Aikens*, 25 Vt. 635, and in both cases disregarded; and it may be remarked that the doctrine, however much it may be at variance with the spirit, does not violate the letter of the recording acts. And see *Baxter v. Bradbury*, 20 Me. 260;

Mack v. Willard, 13 N. H. 389; *Dudley v. Caldwell*, 19 Conn. 218, 226; *Mickles v. Townsend*, 18 N. Y. 428, 575; *Somes v. Skinner*, 3 Pick. 52; *The Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; Greenl. Cruise, vol. 4, p. 450, note; Kent, vol. 4, p. 98 (side page) and notes. We think the rule, notwithstanding some adverse and some doubting decisions, has been too uniformly recognized by the American courts to be now repudiated or modified without the authority of a statute, and we are free to say, we think a statute is called for in view of this state of the law, in order to carry into full effect the policy of our recording act, and to prevent its operating, in cases of this kind, as a snare rather than as a protection to purchasers.

The view of the law furnishes an answer to the defendant's first point, to wit: that the plaintiff can recover only on the strength of his own title, not on the weakness of his adversary's. *Trevian v. Lawrence*, 1 Salk. 276; *Palmer v. Ekins*, 2 Ld. Raym. 1550, 1554.

The defendant contends that the plaintiff, by admitting in the agreed statement that Weeden had no title when he conveyed to the plaintiff's predecessor, has lost his right to insist upon the estoppel.

Comyn says: "A man shall not be estopped when the truth appears by the same record." Com. Dig. Estoppel, E. 2. And again, "If the jury find the truth of the fact, the court will give judgment accordingly without regard to the estoppel." Com. Dig. Estoppel, E. 10. In *Wheelock v. Henshaw*, 19 Pick. 341, 345, the court, citing Comyn, says: "The same principle applies where the parties agree to submit a case to the decision of the court upon certain facts agreed;" and refused, in that case, to allow the plaintiff the benefit of an estoppel against his own admission of the truth. The rule, however, is not without its qualifications; and Comyn says: "Where an estoppel binds the estate and converts it to an interest, the court will adjudge accordingly; as if A leases land to B for six years, in which he has nothing, and then purchases a lease of the same for twenty-one years, and afterward leases to C for ten years, and all this is found by verdict, the court will adjudge the lease to B good, though it was so only by conclusion." And so, also, the law is expressly decided in *Rawlyn's case*, 4 Co. 52; and in *Weale v. Lower*, Pol. 54, which latter case overrules *Ischam v. Morrice*, Cro. Car. 109, in which a different view obtained. In *Weale v. Lower*, in answer to this objection made on the authority of *Ischam*

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v. Merriam, it was said, "that the law is so in cases of obligations, covenants, or personal contracts, which cannot be turned into an estate, but in other cases where the estate is bound by the conclusion and converted into an interest, although the jury find the matter at large, yet the court shall judge according to law that the estate is good by reason of the estoppel." This case, as well as *Rawlyn's case*, was decided after mature consideration, and is of high authority. And *Webb v. Austen*, 8 Scott, N. R. 419; 2 Wms. Saunders, 418 c; *McLaughland v. Wood*, 1 Rol. Abr. 474; and Bacon's Abr. Leases, O, cited in 8 Scott, N. R. 444, 445; *Doe v. Oliver*, 5 M. & R. 202. Indeed, the rule that the estoppel will not avail where the truth appears, would not seem to be so inflexible that it may not be disregarded, even where no estate is subsequently acquired, if justice requires. *Cuthbertson v. Irving*, 4 H. & N. 620, 742; 2 Smith's Lead. Cas. (6th ed.) 712.

In *Wheelock v. Henshaw*, 19 Pick. 341, where the estoppel was disallowed because the facts were admitted, no estate was acquired to feed the estoppel after the making of the deed relied on as creating the same. In the latter case of *White v. Patten*, 24 Pick. 324, which was also tried on an agreed statement disclosing the facts, and apparently without reserve, the court held that if one having no title to land conveys the same with warranty, by a deed which is duly recorded, and afterward acquires a title and conveys to a stranger, the second grantee is estopped to aver that the grantor was not seized at the time of his conveyance to the first grantee, thus giving effect to the estoppel notwithstanding the admission.

We think if an estoppel by warranty is to have any effect at law beyond the warrantor and his heirs, we ought to follow out the analogies of an estoppel by the common-law modes of assurance, and to hold that the title which accrues to the grantee or his assigns, when the estate is subsequently acquired, cannot be prejudiced by any admission of the truth. We know of no case which, while recognizing the estoppel as binding on a second grantee, intimates that in a case of this kind the party setting up the estoppel will lose the benefit thereof by admitting the truth, or not objecting to its being proved. We therefore decide, that the plaintiff's right to insist on the estoppel is not impaired by his admission.

The defendant also contends that the deed from Weeden to the plaintiff, being a deed-poll, does not create an estoppel, because estoppels must be mutual, and a deed-poll will not estop the grantee.

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The case of *Gardner v. Greene*, 5 R. I. 104, contains a *dictum* which is relied on in support of this position ; but being in this respect merely *obiter dictum*, we do not regard it as binding authority. Of all the cases in which an estoppel by warranty has been applied, no one is pointed out in which its applicability was questioned on this ground ; and yet we cannot suppose that in all, if even in the greater part of them, the conveyance was by deed indented. The warrantor is equally liable to suit, whether the warranty is contained in a deed-poll or an indenture, and therefore in so far as the estoppel is applied to avoid circuity of action, the reason for it is the same in either case. We think Mr. Hare presents the correct view in his note to *Doe v. Olivier*, 3 Smith's Lead. Cas. (6th ed.) 713. He says : " Whether an estoppel shall conclude both parties or be limited to one, depends upon the intention as collected from the whole deed. There is no rule of law which prevents a man binding himself, while leaving others free."

We do not find, among the objections which are made to the plaintiff's claim, any sufficient reason to prevent the recovery. We give judgment for the plaintiff.

POTTER, J., dissented.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

**COMMONWEALTH V. VERMONT AND MASSACHUSETTS RAILROAD
COMPANY.**

(102 Mass. 1.)

Railroad company — who are passengers. Season tickets — conditions on ticket

A railroad corporation, in consideration of the payment by a person, of a certain sum of money, and of his agreement to supply the passengers on the trains with ice water, issued to him a season ticket over their road and permitted him to sell popped corn on their trains. *Held*, that while traveling under this contract, he was a passenger and not a servant of the corporation. (*See note, p. 304.*)

A person was killed while riding on defendant's road, on a season ticket containing this condition: "The corporation assumes no liability for any personal injury received while in a train to any season ticket holder." *Held*, that this condition did not relieve the defendant from their legal liability, on an indictment under a penal statute, for gross negligence.

INDICTMENT under the Gen. Stat., ch. 63, § 97, to recover a fine for the use of the widow and children of George Johnson, alleged to have been killed by reason of the gross negligence of servants and agents of the defendant corporation while he was a passenger on their railroad. At the trial, the facts were agreed upon. The defendant, in consideration of the payment to them of a certain

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sum of money in quarter-yearly installments, and of his agreement to supply the passengers on one of their trains with iced-water, issued season tickets to Johnson quarterly for his passage on their trains, and permitted him to sell popped corn on their trains. The season tickets contained the following indorsement: "The corporation assumes no liability for any personal injury received while in a train to any season ticket holder." The other facts relating to Johnson's connection with the company are stated in the opinion.

Johnson was killed, while riding on defendant's road, under the season ticket, by reason of a collision between the train and a hand-car in charge of defendant's servants.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. A. Torrey, for Commonwealth.

D. S. Richardson & C. H. B. Snow, for defendant.

AMES, J. In order to maintain this indictment, it should be made to appear that the person for whose death it was brought was a passenger upon the defendants' road at the time of the accident, and that his death was occasioned by the negligence or carelessness of the company, or the unfitness or gross negligence or carelessness of its servants or agents. Gen. Sta., ch. 68, § 97. The defendants object that, upon the facts reported, neither of the two conditions, upon which their liability depends, was fulfilled; that the man who lost his life was not a passenger, but a servant or workman of the company; and that there was no legal and competent evidence of negligence on the part of themselves or their servants or agents. We think that neither of these objections can be maintained.

It appears that he made to the defendants on October 17, 1868, an offer to pay them a certain sum of money "for the privilege of riding and selling pop-corn on all passenger trains" on their road, giving them the alternative, however, of his having the same privilege at a price ten dollars less per quarter, if he furnished ice and water for the passengers during the summer months. In reply to this offer, he was notified in writing that "he would be charged two hundred dollars per annum for right to sell corn in cars whole length of road," "and he to do no watering passengers in cars." Under this agreement he traveled in the cars until the following

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summer, when he made a further proposition, to furnish ice and see that water was supplied to the passengers of the morning train up as far as the tunnel, if he could have permission to sell his corn in the extra trains, which privilege he did not have under the original agreement. This proposition was accepted and acted upon. No particular time was mentioned in this agreement, and no other agreement was made; but in the summer of 1870 he had begun supplying water to the passengers, as in the preceding season.

It appears that the selling of corn to the passengers in the trains had been his regular business for a long time, and that in order to follow that business he held a season ticket, renewed every quarter, and was a traveler over the road substantially every day. It appears to us that in this state of facts he must be considered as a passenger, within the meaning of the statute. It certainly can make no difference, that his object in traveling was to sell his merchandise while in the act of traveling; and that he had no other purpose in going over the road. Like other season ticket holders, he paid the defendants for the privilege of passing and repassing regularly over the road, and was at liberty to go or not as he pleased. It appears to us that the services which he rendered, in furnishing water to passengers, were intended as a compensation for some increase in his privileges. The fact remains, that he was traveling on his own business, and not on that of the defendants. Even if the report states what amounts to an implied renewal of the contract of the previous year, the traveling and the accommodation to passengers during the summer months were merely incidental to his regular business, and were for his own convenience and not for the defendants'.

Upon the other point, we think it was entirely a question of fact whether negligence on the part of the defendants, within the meaning of the statute, was shown to have existed. We cannot say, upon the report, that there was no evidence to submit to the jury upon that question. On the contrary, there was evidence tending to show carelessness on the part of the track-master in the management of a hand-car, and that such negligence was the cause of the accident. The question was therefore properly submitted to the jury. *Gaynor v. Old Colony & Newport Railway Co.*, 100 Mass. 208.

We think, furthermore, that none of the conditions printed upon the back of the ticket could have the effect to relieve the defend-

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ants from their legal liability, under a penal statute, for gross negligence and carelessness.

Exceptions overruled.

NOTE.—In *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71, a similar point was decided. Plaintiff was keeping bar upon the steamboat of defendants, under an agreement by which he was to pay them two hundred dollars per month for the privilege and use of the bar, etc. He also acted as agent for an express company, such company paying defendants a monthly rate for carrying packages and messenger over the route. Defendants' route consisted partly of a passage by steamboat and partly of a passage by railway. Plaintiff was injured by defendants' railway engine, when on his way to take charge of the bar and the express matter. *Held*, plaintiff sustained the relation of passenger to defendants, and not the relation of employee. The court held that, even as bar-keeper, plaintiff was, in no sense, an employee of defendants. — *1187.*

COMMONWEALTH v. BENNETT.

(188 Mass. 20.)

Statutes — construction of. Seeing clause in repealing statute.

Defendant was proceeded against for violation of a statute which had been repealed by a later statute, but which provided that nothing therein contained should affect "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act." The offense alleged occurred before the latter statute took effect, but after its approval by the governor. *Held*, that the indictment was sustainable.

COMPLAINT that the defendant did, on July 4, 1870, keep intoxicating liquors, with intent to sell the same without authority therefor. The jury returned a verdict of guilty and defendant alleged exceptions. There were two cases tried together, but as the second is unimportant that part of the opinion relating thereto is omitted.

F. P. Goulding, for defendant.

O. Allen, Attorney-General, for Commonwealth.

MORTON, J. These two cases were argued together. The first is a complaint for keeping intoxicating liquor with intent to sell in violation of law; the other is an indictment for keeping and main-

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taining a tenement used for the illegal sale and keeping of intoxicating liquor.

1. The court in substance ruled, that the defendant might be convicted on the complaint, upon proof that, on July 4, 1870, he kept ale with intent to sell it in violation of the statute of 1869, chapter 415, sections 81, 86. The question is, as to the correctness of this ruling.

The statute of 1870, chapter 389, which repealed the provisions of the statute of 1869 under which this complaint was brought, was approved by the governor June 22, 1870, and went into effect July 22, 1870. The complaint was made after the act had gone into effect. The defendant contends that he could not be legally convicted, because there was, at the time of the complaint and of the trial, no law in force which would authorize the court to try or sentence him for the act complained of. And this would be so, unless the case falls within the saving clause of the repealing statute.

It is settled by numerous adjudications in this Commonwealth, that there can be no legal conviction of an offense, unless the act is contrary to law at the time it is committed; nor can there be a judgment, unless the law making the act unlawful is in force at the time of the indictment and judgment. *Commonwealth v. Marshall*, 11 Pick. 350; *Commonwealth v. Kimball*, 21 id. 373; *Commonwealth v. Pattee*, 12 Cush. 501; *Commonwealth v. Edwards*, 4 Gray, 1. But the saving clause in a repealing statute prevents the operation of the repeal, and continues the repealed law in force as to all cases to which it applies. The question in this case, therefore, is whether the saving clause of the statute of 1870, chapter 389, section 8, applies to it. We are of the opinion that it does.

If the saving clause had included only penalties or forfeitures incurred prior to the passage of the act, it would not have applied to the defendant's case. *Johnson v. Fay*, 16 Gray, 144. But such is not the language of this statute; it is "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act." A statute speaks from the time when it takes effect. A penalty "already incurred" is one incurred at any time before the statute takes effect. If the provision had been merely to save "all penalties already incurred," there would be no doubt as to its construction. The addition of the provision that the penalties must also be incurred under a law in force prior to the passage of the act, which perhaps is tautological, does not change the construc-

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tion. We think the intention of the legislature was to provide that the act should not affect any penalty incurred before it took effect. When the statute became operative, the defendant was liable to a penalty already, that is, at that time incurred under the provisions of a law in force prior to the passage of the act, and might be prosecuted for it. His conviction, therefore, in the first case was legal.
Exceptions overruled.

HOWE V. HAYWARD.

(100 Mass. 54.)

Statute of frauds. Earnest.

Plaintiff and defendant made an oral contract for the sale of property by the plaintiff to the defendant, and each deposited a sum of money with a third party, to be paid by him to either, in case the other should fail to fulfill his part of the contract. *Held*, that the deposit was not an "earnest" within the statute of frauds.

ACTION of contract for breach by defendant of an oral agreement to buy the stock of plaintiff's livery stable. Defense, the statute of frauds. The trial judge directed a verdict for the defendant and reported the case for revision of this court. The opinion states the facts.

T. G. Kent, for plaintiff.

P. E. Aldrich, for defendant.

CHAPMAN, C. J. It appears by the report, that the parties made an oral contract for the sale of property by the plaintiff to the defendant, and that each of them deposited the sum of \$200 in the hands of one Taft. The plaintiff contended that the money deposited by the defendant was given in earnest to bind the bargain, or in part payment. The defendant contended that it was under an agreement that the sum should be forfeited in case he refused without just cause to perform the contract. The jury found that it was not deposited in earnest or in part payment, but was deposited

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"as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so;" and under the instruction of the court found for the defendant. The plaintiff contends that the finding should have been for the plaintiff, because, if the money was deposited as a forfeiture, as stated, it amounted to "earnest," within the meaning of the statute of frauds. This depends upon the proper definition of that term as used in the statute.

The idea of "earnest," in connection with contracts, was taken from the civil law. Güterbock on Bracton (Am. transl.), 145. It is not necessary to consider its precise effect under that law. As used in the statute of frauds, "earnest" is regarded as a part payment of the price. 2 Bl. Com. 447; *Pordage v. Cole*, 1 Saund. 819 b; *Langfort v. Tiler*, 1 Salk. 113; *Morton v. Tibbett*, 15 Q. B. 428; *Walker v. Nussey*, 16 M. & W. 302; 1 Dane's Abr. 235. The case of *Blenkinsop v. Clayton*, 7 Taunt. 597, cited by the plaintiff, turned on the question of delivery.

The deposit with Taft was not therefore equivalent to an earnest to bind the bargain, or part payment, and there was not a valid sale within the statute of frauds. The ruling was correct.

Judgment on the verdict.

GODDARD V. MONITOR MUTUAL FIRE INSURANCE COMPANY.

(103 Mass. 52.)

Fire insurance — misstatement by broker as to use of building.

A policy of insurance against fire was issued on a building, upon the application of an insurance broker, who, without the owner's knowledge or authority, stated in the application that the building was used as a machine shop. It was, in fact, used as an organ factory, the risk on which was more hazardous than on a machine shop. The owner accepted the policy expressed to be on a machine shop, and paid the premium. In an action on the policy after loss, *held*, that the policy was void, as the minds of the parties never met on the subject-matter of the contract.

ACTION on a policy of insurance against fire, issued by defendant, insuring the plaintiff in the sum of \$2,500 "on his frame two-story

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building, occupied as a machine shop and situated" in Worcester. By the terms of the policy the application was made a part of the contract, and it was conditioned that, "if the risk shall be increased by any means whatever, within the control of the insured, this policy shall be void," and "whenever a building hereby insured shall be altered, enlarged or appropriated to any other purposes than these herein mentioned, or the risk otherwise increased, by the act or with the knowledge or consent of the insured, without the consent of the company first obtained in writing, this policy shall be void."

The application for the insurance was made by one Gleason, an insurance broker, in the name of the plaintiff, and was taken by him to one Mowry, an insurance agent, having authority from the defendant to receive and transmit applications to them. Mowry filled up certain blanks in the application from information furnished by Gleason—among others that the building was used for the manufacture of machinery. Before writing in this answer Mowry asked Gleason "what was done in the building?" and Gleason replied "that it was used as an organ and melodeon factory, but he believed that a small part of it was to be sometime used for a machine shop." Mowry forwarded the application to defendants who returned a policy. Mowry gave this to Gleason and Gleason delivered it to plaintiff, who thereupon paid the premium.

The plaintiff did not see the application; gave no information from which it was filled up, and did not know of its existence, except from the reference to it in the policy, until since the commencement of this action. And the first knowledge he had of the insurance was when Gleason brought the policy to him and he paid the premium. At the time of the application and up to the time of the fire the building insured was used and occupied as a manufactory of organs and melodeons. The risk of the destruction by fire of such a manufactory was agreed to be greater than that of a machine shop.

"Gleason was accustomed to solicit applications for insurance, from persons owning buildings; and to procure, either directly from the insurance companies, or through the intervention of agents, policies of insurance; and for so doing he received a certain amount of the premium paid by the insured to the company, as a commission for his services. He did not solicit in behalf of any particular company, but effected insurance in such companies

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as he saw fit, unless the party to be insured indicated a preference. He had no account with the defendants, his name not being on their books at all; and had never written to, or received any letters from them.

P. E. Aldrich, for plaintiff.

W. G. Colburn (*C. Allen* with him), for defendants.

AMES, J. It is a fatal defect in the plaintiff's case that the policy professes to insure a machine shop, and that the building destroyed by fire was not a machine shop. It would be doing great violence to language to contend that a building in which organs and melodeons are manufactured can be correctly described as a machine shop. It appears by the report of the case, that the risk of destruction by fire is greater in the case of a building in which organs and melodeons are manufactured than that of one in which machinery is manufactured. The representation, therefore, was material, and it was untrue. It makes no difference that the misrepresentation was accidental, unintentional, and without any fraudulent intent, or even that the party insured was ignorant that such a representation had been made. In either case, the ground of objection is the same; the insurers were misled. They were willing to insure a machine shop, and supposed they were so doing; but they have never insured the plaintiff's organ factory, which was a different and more hazardous risk. The misrepresentation takes away the foundation of the policy; and as it was an affirmation of a fact as then existing, it is enough to prevent the policy from taking effect as a contract. The minds of the parties have not met upon the organ factory as the subject-matter of insurance. *Kimball v. Aetna Insurance Co.*, 9 Allen, 540; *Carpenter v. American Insurance Co.*, 1 Story, 57; *Campbell v. New England Insurance Co.*, 98 Mass. 381; *Wilbur v. Bowditch Insurance Co.*, 10 Cush. 446. The plaintiff sues upon the policy, and the court cannot alter the contract as therein expressed. *Tebbetts v. Hamilton Insurance Co.*, 8 Allen, 569. However unfortunate this may be for the plaintiff, he accepted the policy in its present shape, and cannot complain that he has been misled by it. *Barrett v. Union Insurance Co.*, 7 Cush. 175.

In this view of the case, the application becomes unimportant, as

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does also the question whether Gleason was the plaintiff's or the defendants' agent. It is decisive of the case, that the policy, which the plaintiff accepted without objection, or attempt to have any mistake corrected, cannot be applied to the building which was destroyed by the fire.

Judgment for defendants.

PIERCE V. GEORGE.

(108 Mass. 73.)

Fixtures — machinery — what passes under mortgage.

The owner of a machine shop gave a chattel mortgage on the machinery therein, before it was set up, but in contemplation that it should be set up and attached to the building. He afterward, and after it was set up, gave a mortgage on the land and building. *Held*, that the second mortgagee could hold the machinery against the first mortgagee.

A mortgage of a machine shop covers machines, pulleys and shafting, bolted or screwed to the building, or to blocks bolted to the building; also essential parts of the machinery, although they can be detached therefrom without injury. But it does not cover machines which are not fastened to the floor but are supported by their own weight; nor machines which are fastened to benches, although run from the shafting; nor vises screwed to benches although the benches are nailed to the building. (*See note, p. 814.*)

ACTION in tort for the conversion of machinery and tools. The case was referred to an auditor who reported as follows:

I find that on March 15, 1867, Crawford Pierce, Joseph R. Pierce and Henry O. Lothrop, then residing and doing business in Milford, were the owners of a machine shop in Milford, which they had erected and were then occupying for the purpose of manufacturing therein heel and toe plates and shoe nails, and were also on that day the owners of certain machinery in said shop, which they used for the purposes of their manufacture; that on that day the said owners made a chattel mortgage of said property to Fisk & Haven to secure the payment of \$3,200 in one year with interest, and said mortgage was duly recorded April 13, 1867, with the records of mortgages of personal property in Milford; that the title to said property acquired under said mortgage by Fisk & Haven

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is now vested in the plaintiffs; that on April 27, 1867, the Pierces and Lothrop mortgaged the machine shop and the lot of land upon which it stood to the defendant, to secure the payment of a debt; and that the defendant is now the owner of the real estate mortgage and debt, which is unpaid. The plaintiffs claim title to the machinery under the mortgage to Fisk & Haven, and the defendant claims title thereto under his real estate mortgage.

The machinery was connected with and attached to said building as follows: 1. A large punch weighing 8500 lbs., bolted to blocks, and the blocks bolted to the floor timbers of the building. It was operated by a belt and pulley connected with a counter shaft, which was connected by a belt and pulley with a line of main shafting running through the building. 2. Two small punches, weighing 400 lbs. each, fastened to the floor by screws, and operated by a belt and pulley connected with the main shaft, as above. 3. Two counter sinking lathes, small machines, fastened to a bench by screws, and operated by a foot movement passing through the bench from beneath. 4. Three polishing frames, two large and one small, fastened at one end by bolts to a wooden post in the building, and at the other end to plank supports bolted to the floor timbers. They were operated by belts and pulleys attached to counter shafting, which was connected with the main shaft, as above. 5. Two rubber emery wheels and twenty-two wooden wheels, which belonged to the polishing frames, but could be detached therefrom without injury to the machine, for the purpose of being repaired or replaced. 6. One rattler and frame, a small machine, its bearings resting upon wooden supports fastened to the timbers of the building, and run by a belt and pulley connected with the main shaft. 7. Five large grindstones, resting upon frames which stood upon the floor, and operated by belts and pulleys; three of them connected with the main shaft by counter shafting, and two connected directly with the main shaft. 8. Three vibrators, weighing 1600 lbs. each, the frames consisting of wooden posts twelve inches square and ten feet high, mortised to the timbers of the building above, and at the lower end resting upon stone blocks upon the ground under the floor. The posts were kept in place below by the floor planking, and the machines were run by belts and pulleys connected with the main shaft by counter shafting. 9. One polisher, fastened to the floor and operated from the main shaft, as above. 10. Two tack machines, weighing 2600 lbs. each, resting upon the floor, supported

only by their own weight, and operated from the main shaft, as above. 11. One splitter, weighing 600 lbs., resting upon blocks which rested upon the floor, not fastened, and operated from the main shaft as above. 12. One wrought-iron and two cast-iron vices, fastened to benches by bolts, and the benches fastened to the building by nails. 13. One 8-foot engine lathe, 24-inch swing, and one hand lathe, with counter shafting and hangers to each machine. These machines rested upon the floor without being fastened thereto, and were operated by a belt and pulley connected by the counter shafting with the main shaft. 14. One fan-blower, bolted to a plank, which was bolted to the roof timbers of the buildings, and operated by the main shaft, through counter shafting. 15. One portable blacksmith's forge, resting on the floor, without fastening, and connected by a pipe with the chimney of the building. 16. Pulleys, shafting and hangers, fastened to the timbers of the building by bolts and screws, and connected with the machines by belts. 17. Two anvils, resting upon blocks which stood upon the floor.

"All said machinery could be detached and removed from the building without substantial injury either to the machines or to the building, except the vibrators, which could not be removed without taking up the floor of the building. The motive power to run the machinery was furnished by a steam engine connected with the building. All the machinery was purchased, designed for and adapted to said business.

On March 15, 1867, when the Fisk & Haven mortgage was given, all said machinery was in the shop for the purpose of being set up, but only the large punch, one grindstone, and the anvils and forge were in position, as above described; but all said machinery had been placed in position, as described, prior to April 27, 1867, when the defendant's real estate mortgage was given. The Fisk & Haven mortgage was given in contemplation that all the machinery should be set up and fastened to the building, as above described.

"On or about September 7, 1869, the defendant took possession of said real estate under his mortgage, the condition thereof having been broken, locked the doors of the shop and retained the key in his custody. All the property described in the plaintiffs' writ was then in the building, and has continued there until the present time. On September 30, 1869, the plaintiffs demanded all said property of the defendant, and the defendant, claiming the title to

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the machinery mentioned above, refused to give up said machinery to the plaintiffs, but he never claimed the title or possession of the other property, and never refused to restore it to the plaintiffs, nor to permit the plaintiffs to take it from the building; and I find that the defendant never converted it to his own use. As to the machinery above enumerated, I find that the defendant converted it to his own use, and is liable in this action therefor, unless the court should determine upon the foregoing statement that the defendant was the owner thereof as against the plaintiffs."

The parties agreed that the question of the ownership of the property should be submitted to the court on the auditor's report as an agreed statement of facts. The superior court gave judgment for the defendant, and the plaintiffs appealed.

P. E. Aldrich, for plaintiffs, cited *Burk v. Hollis*, 98 Mass. 55; *McLaughlin v. Nash*, 14 Allen, 136; *Voorhies v. McGinnis*, 46 Barb. 242; *Lacey v. Giboney*, 36 Mo. 320; *Vanderpoel v. Van Allen*, 10 Barb. 157; *Hellawell v. Eastwood*, 6 Exch. 295; *Gale v. Ward*, 14 Mass. 352; *Murdock v. Gifford*, 18 N. Y. 28; *Swift v. Thompson*, 9 Conn. 63; *Sturgis v. Warren*, 11 Vt. 433; *Bartlett v. Wood*, 32 id. 372.

F. P. Goulding and *H. B. Staples*, for defendant, cited *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306; *Richardson v. Copeland*, 6 Gray, 536; *Clary v. Owen*, 15 id. 522; *Lynde v. Rowe*, 12 Allen, 100; *McLaughlin v. Nash*, 14 id. 136; *Talbot v. Whipple*, id. 177; *Farrar v. Stackpole*, 6 Greenl. 154; *Parsons v. Copeland*, 38 Me. 587; *Burnside v. Twitchell*, 43 N. H. 390.

AMES, J. In ascertaining what are fixtures, the object, the effect and the mode of annexation are to be considered. *McLaughlin v. Nash*, 14 Allen, 136. The question between these parties is governed by the rules which apply to the case of mortgagor and mortgagee; the defendant claiming the contested property by virtue of a mortgage of the real estate, and the plaintiffs under an earlier conveyance from the mortgagor, in which the machinery is described as personal property. The report finds that, before either of the mortgages under which the parties respectively claim was made, the mortgagors owned a machine shop which they were occupying for manufacturing purposes, and were also owners of the machinery described in the report. It appears also that all the machinery had been placed by them in position before the defendant's title accrued.

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Under such circumstances, and inasmuch as the report finds that the mortgage under which the plaintiffs claim was given in contemplation that all the machinery should be set up and fastened to the building as described in the report, we think that whatever the mortgagors annexed to the freehold, for the more convenient use and improvement of the premises, must pass by the mortgage of the real estate. *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. Articles placed in a mill by the owner to carry out the obvious purpose for which it was erected, and adapted to that purpose, are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere. *Parsons v. Copeland*, 38 Me. 537. In a building erected as a factory, the steam works relied upon to furnish the motive power, and the works to be driven by it, are essential parts of the factory, adapted to be used in it and with it, and would pass with it by a conveyance of the real estate. *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306.

By this rule the large punch, the three polishing frames, the three vibrators, the polisher, the fan-blower and the pulleys, shafting and hangers, appear from the auditor's report to have been annexed to the freehold and specially adapted to be used in connection with it. They therefore became part of the machine shop, and could not be severed from it without the defendant's consent. The two small punches, although not so firmly attached to the building, appear to us to fall within the same rule. The wheels belonging to the polishing frames come somewhat near to the dividing line, but as they are understood to be essential parts of the polishing machines, they must be governed by the same rule.

But the lathes fastened to a bench by screws, and operated by a foot movement; the five grindstones resting upon frames standing upon the floor; the rattler and frame, the tack machines, the splitter, the anvils, the vises, the lathes, and the portable forge, are none of them fixtures in any sense of the word. For the value of these articles, to be determined by an assessor,

The plaintiffs are entitled to judgment.

NOTE. — Where the facts disclose that machinery is intended to be a permanent accession to the freehold, the execution of a chattel mortgage on it is not sufficient to overcome this presumption or raise the contrary one by an intent to preserve its personal character; it may, nevertheless, become part of the freehold and pass to a purchaser with it. Com. of App., 1872, *Vonrhein v. McGinnis*, 48 N. Y. 273, reversing 48 Barb. 242.

Looms in a woolen factory, connected with the motive power by leathern bands, and

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fastened to the floor by screws, which kept them steady while working, and which could be removed without injury to themselves or the buildings, are chattels, and not a part of the realty. *Murdock v. Gifford*, 18 N. Y. 28.

So in *Ford v. Cobb*, 20 N. Y. 844, where salt kettles were bought and mortgaged to the seller as personalty. They were imbedded in brick arches, but could be removed without injury to them by displacing a portion of the brick at slight expense, and the course of manufacture required them to be so removed and reset annually. *Held*, that they continued personalty as against a subsequent purchaser of the salt works. See, also, *Sheldon v. Edwards*, 35 N. Y. 279.

In *Cresson v. Stout*, 17 Johns. 116, it was *held*, that spinning frames and carding machines in a mill, fastened to the floor by cleats and pins, were personal property, and not fixtures, as between mortgagor and mortgagee. The mortgage described the piece of land "together with the machinery, water-course, etc., thereunto belonging." Subsequently, other machines were placed in the mill." *Held*, that they did not become fixtures, and were not covered by the mortgage.

In *Vanderpool v. Van Allen*, 10 Barb. 157, a mortgage was executed on a cotton mill premises. The mortgage described the land on which the mill stood, and included "the mill and appurtenances." It was *held*, that spinning frames and carding machines fastened to the building by the belts by which the machinery was put in motion, and by cleats tacked to the floor, were not fixtures, and did not pass under mortgage, and the claims of creditors of the mortgagors were preferred.

So in *Swift et al. v. Thompson*, 9 Conn. 63, where the machinery of a cotton manufactory consisted partly of implements in no way attached to the building, partly of spinning frames standing upon the floor, around the feet of which cleats were placed and nailed to the floor to prevent their moving, but such looms and frames were not otherwise attached to the building; and partly of other machinery, to the posts of which iron plates were attached, through which wood screws passed, fastening them into the floor, but by unscrewing such screws the machinery could be removed without injury; it was *held*, that the whole of such machinery was personal property as against a mortgagee.

In *Walker v. Sherman*, 20 Wend. 686, it was *held*, that carding machines, a packing machine, a shearing machine, spinning jennies and loom, used in a building, were not fixtures that would pass with the land.

In *Tate v. Warnick*, 8 Blackf. 111, it was *held*, that a carding machine placed in a building erected for the purpose of carrying on carding, the machine standing in its usual place of operation, and ready to be started, was not a fixture but was liable to levy as the personal property of the debtor.

In *Tobias v. Francis*, 8 Vt. 436, it was *held*, that the machinery in a wool-carding factory was personalty; and in *Sturgis v. Warren*, 11 Vt., that case was followed and re-affirmed by a like holding.

In the case of *Gale v. Ward*, 14 Mass. 382, where the owner of a wool-carding factory had mortgaged the building and appurtenances for carrying on the same, but still remained in possession, it was *held*, that certain carding machines for carding wool, which could not be taken out of the building without first being taken in pieces, were personalty and liable to attachment at the suit of a creditor of the mortgagor.

In *Teaf v. Hewitt*, 1 Ohio St. 511, the doctrine is discussed at great length and the authorities ably reviewed, and it was *held*, that the machinery in a woolen factory, consisting of carding machines, spinning machines, power looms, etc., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building except by cleats or other means to confine them to their proper places for use, and capable of removal whenever convenience or business may require, without injury, are not fixtures, but chattel property, and did not pass under a mortgage describing the premises as "Lot No. 282, in Vier's addition to the town of Steubenville on which is erected a woolen factory," and conveying the lot "and appurtenances."

In the case of *Hutchinson v. Kay*, 23 Beav. 412, decided by Lord ROMILLY in 1857, one X., in 1847, had mortgaged a certain mill, being a nankeen manufactory, to the defendant, with the appurtenances, "together with the steam engines, boilers, shafting, piping, mill gearing, gasometers, gas-pipes, drums, wheels, and all and singular other the

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machinery, fixtures and effects fixed up in, or attached or belonging to the said mill or factory, building and premises." At the date of the mortgage there were on the premises 220 looms for weaving cotton yarn into cloth. These looms were on the basement and standing on iron feet, and were steadied for working in the usual way, thus: Four holes were made in the flagg pavement, into each of which was placed an iron cylinder, surmounted by an iron cup or hollow parallelogram, which cylinder with the cup is usually called a "loom foot," and each of the four legs of the loom was placed, without any fastening, into one of such cups; the cups themselves were not fastened to the flooring of the mill in any way, but were merely dropped into the holes made in such flooring; they could be taken out and removed at pleasure without any fastening of any kind whatever having to be undone, there not having been, in fact, any such fastening. The defendant had subsequently sold the mortgaged premises under the customary mortgagee's power of sale to the plaintiff, in words equivalent to those used in the mortgage deed. Lord ROMILLY in deciding that the looms did not pass, either under the mortgage or by the sale, spoke in effect as follows: "My opinion is that the words used mean that the mill and every thing that properly belongs to the mill is the thing that is mortgaged. I do not, however, think that the furniture of the mill (including these looms) does properly belong to the mill; it is liable to be changed from time to time. * * * I do not doubt that looms are machinery in one sense, but the question is, are they (properly speaking) machinery belonging to the mill? In one sense, no doubt, they belong to the mill, but I read those words as 'belonging essentially to the mill,' and forming necessarily a part of it, whatever may be the purpose to which the mill (as a mill) may be applied. To whatever purpose the mill may be applied, the steam power, the gas lighting, and the like, do form a part of it, but the others do not, being merely accidental, and *no more forming a part of the mill than a carpet forms part of a house. If a house and all the things belonging to the house were assigned, that would not necessarily include the furniture, unless it was so specified.* * * * I am clear the looms are not fixtures in any proper sense of the term."

In *Haley v. Hammersley*, 8 DeG. F. & J. 587; 7 Jur. (N.S.) 765; 20 L. J. Ch. 771; 9 W. R. 562; 4 L. T. (N. S.) 209, it was held that a mortgage of a silk mill with the steam engines, boilers, steam pipes, main-shafting, mill gearing, millwrights' work, and all other machinery whatsoever being, or which should thereafter be, on the land described in the mortgage, as against a second mortgage, is not confined to machinery necessary for giving power to the mill as being *quodam generis* with the specified particulars, but extends to silk spinning machines resting by their weight only on the ground, but attached by movable bolts to iron rods fixed to mill head.

When a rolling machine (which itself was admittedly a fixture) was fitted with a number of different sets of loose rollers, one of which only could be actually attached to the machine and used at one time, but the duplicates were kept for the purpose of effecting different kinds of work, held, in a contest between the mortgagees and the assignees in bankruptcy of the mortgagor, that all the rollers that had been fitted to the machine thereby became a part of it, and passed to the mortgagees by virtue of an equitable mortgage by deposit of the lease of the mill. *Richards, In re, Lloyd's Banking Company, Ex parte, and Asbury, Ex parte*, 28 L. J. Bank. 9; 20 L. T. (N. S.) 997; 4 L. R. Ch. 680; 17 W. R. 997. Held, also, that other rollers, which had been purchased with a view of using them in the machine, but had not been fitted to the machine, were not part of the machine, and did not pass to the mortgagee. *Ib.*

Weighing machines which rest in brick cavities constructed in the ground for that purpose, but which are not attached to the brick-work, and can be lifted out of the cavity at pleasure, are not fixtures. *Ib.*

Straightening plates, formed of flat plates of iron and let into the iron flooring of a room so as to be on a level with the surrounding floor and united to it, are fixtures. *Ib.*

Under a mortgage of an iron mill, with certain specified machinery, and all engines, machinery, fixtures, and things which might thereafter be fixed or fastened in or upon the premises, whether in addition to or substitution for the fixtures, machinery, articles and things. Held, that entirely new machinery, as well as additions to existing machinery, passed to the mortgagee. *Metropolitan Counties Ins. Society v. Brown*, 3 Jur. (N. S.) 878; 23 L. J. Ch. 581; 7 W. R. 303; 28 Beav. 454.

Things firmly annexed to the freehold by a mortgagor in possession after the date of

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mortgage, for the purpose of improving the inheritance, pass to the mortgagee, and do not pass to the assignees of the mortgagor upon his bankruptcy; and that rule applies as well to trade as to other fixtures, the mortgagor not being in possession as tenant to the mortgagee. *Walmsley v. Milne*, 7 C. B. (N. S.) 115; 29 L. J. Q. P. 97; 6 Jur. (N. S.) 125; 1 L. T. (N. S.) 62.

In *Holland v. Hodgson*, L. R., 7 C. P. 323 (3 Eng. R. 655), the facts were these: The owner in fee of a worsted mill at which he carried on the business of a worsted spinner and stuff manufacturer, mortgaged it to the plaintiffs. By a deed of arrangement under the bankruptcy act, 1861, subsequently executed, the mortgagor assigned all his property to the defendants and trustees for the benefit of his creditors. Under this latter deed the defendants seized certain looms which were in the mill that was mortgaged. These looms were attached to the stone floors of the rooms of the mill by means of nails driven through holes in the feet of the looms, in some cases into beams which had been built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose. It was necessary that the looms should be so attached for the purpose of steadying them and keeping them in a true direction, perpendicular to the line of the shafting, by means of which the steam power was applied to them. It was impossible to remove the looms without drawing the nails; but this could be done easily and without any serious damage to the flooring. The plaintiffs brought trover for the looms. *Held* (affirming the decision of the court below), that the looms passed by the mortgage of the defendants as part of the realty, and that the action was therefore maintainable.

Trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage of the freehold, pass under a mortgage of the freehold to the mortgagee. *Okmle v. Wood*, 3 L. R. Exch. 267; 37 L. J. Exch. 158; 18 L. T. (N. S.) 609; affirmed, 4 L. R. Exch. 323; 38 L. J. Exch. 223; 20 L. T. (N. S.) 1012, Exch. Cham.

Tenants of a leasehold mill executed a mortgage of the mill and fixed machinery therein comprised in their lease, together with all looms and other machinery, fixed or movable, which then or thereafter during the continuance of the security should be in or about the mill. There was a number of looms fixed to the floor of the mill by nails driven through two feet of each loom into wooden plugs in the soil beneath. These looms were removable, for the convenience of working them, to other parts of the mill; but the primary intention was that they should remain fixed during the term of the mortgagors. The mortgagors having become bankrupt; *held*, that as between the mortgagees and mortgagors' assignees the looms were fixtures. *Boyd v. Shorrocks*, 37 L. J. Ch. 144; 5 L. R. Eq. 73; 17 L. T. (N. S.) 197; 16 W. R. 102.

In *re Dawson*, 16 W. R. 424, it was held that power looms nailed to the flooring are fixtures. In *Ross v. Hope*, 23 Upp. Canada C. P. 482, it was decided that the owner of real estate had a right to sever the fixtures, and a chattel mortgage properly executed and filed is valid, notwithstanding a subsequent mortgage of the real estate. — RMR.

Williams v. Bemis.

WILLIAMS V. BEMIS.

(108 Mass. 91.)

Action — for work done and material furnished. Statute of frauds.

The plaintiff agreed orally to cultivate defendant's land for two years for a share of the crop, it being understood at the time by both parties that the crop would be more valuable the second year than the first. At the end of the first year the crop was divided according to the contract, but the defendant refused to let the plaintiff cultivate the land for the second year. *Held*, that plaintiff could maintain an action for work done and materials furnished in cultivating the land.

ACTION in contract for work done and materials furnished in cultivating the land of Towne, the defendant's testator, under the following agreement: Plaintiff agreed orally with said Towne to cultivate his (Towne's) land for two years for two-thirds of the crop for two years, the plaintiff to furnish one-half the seed and all the labor, and Towne all the manure. The work was done and seed furnished under the contract the first year, and at the expiration of the first year the crop of that year was divided according to the contract, the plaintiff taking two-thirds and Towne one-third thereof. Towne then refused to allow the plaintiff to plant the land the second year. The work done and seed furnished and used upon the land by the plaintiff during the first year was more than was necessary for the first year's crop, and of greater value than the plaintiff's share of that crop, and inured to the permanent benefit of the land, and of the crop for the second year, as was understood and anticipated by the parties when the contract was entered into and the work was done and the seed used upon the land.

The superior court reported the facts to this court.

G. F. Hoar and W. A. Williams, for plaintiff.

F. P. Goulding, for defendant.

AMES, J. An action for money had and received lies to recover back money paid by a party to an agreement which is invalid by the statute of frauds, and which the other party refuses to perform.

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Cook v. Doggett, 2 Allen, 439; *Basford v. Pearson*, 9 id. 387; *Gillet v. Maynard*, 5 Johns. 85. An action would also lie for the return of any article delivered, or for payment for labor and services rendered, upon such an agreement and under such circumstances. *Sherburne v. Fuller*, 5 Mass. 188; *Lane v. Shackford*, 5 N. H. 130; *Holbrook v. Armstrong*, 1 Fairf. 31. Such is undoubtedly the general rule as established by numerous authorities. "Certainly so much as has been expended by the plaintiff in money or labor may be recovered in an action for money paid, or for work and labor done, for the defendant." *Kiddor v. Hunt*, 1 Pick. 828, 831; *Shute v. Dorr*, 5 Wend. 204. "The true principle is this: the contract being void and incapable of enforcement in a court of law" (the defendant having refused to perform it), "the party paying the money, or rendering the services in pursuance thereof, may treat it as a nullity, and recover the money or value of the services under the common counts." *King v. Brown*, 2 Hill, 485, 487, per NELSON, C. J. In *Gray v. Hill*, Ry. & Mood. 420, BEST, C. J., held that where the defendant, in consideration of certain repairs to be made by the plaintiff, agreed to assign a lease to him, and after the repairs were made refused to make the assignment, and set up the statute of frauds as a defense, the law implied a promise to pay for the repairs, and this implied promise was "not touched by the statute." See, also, *Van Deusen v. Blum*, 18 Pick. 229.

The defendant insists that the work was done by the plaintiff in the cultivation of crops which were to be partly his own and was not done upon the credit of Towne, or with any expectation of charging it against him. Such undoubtedly was the understanding of the parties originally. But as Towne saw fit to say that the special contract was not binding upon him, it cannot be set up by his executor as binding upon the plaintiff. *King v. Welcome*, 5 Gray, 41. It cannot be treated as a nullity for one purpose, and as a contract for another. It required two years for its completion, and both parties understood that there was to be no profit or advantage to the plaintiff except from the operations of both years taken together. A large part of the labor and expense incurred in the first year had no reference whatever to the operations and results of that year, taken by itself, but were a preparation of the land for increased productiveness in the second year. The plaintiff must be considered as having, in that way, paid in advance, in part at least, for the privilege of using the land the second year in the manner

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agreed upon. By the repudiation of the contract, he has lost the privilege which he had so paid for. The consideration upon which he made that payment has failed by the willful act of the other party to the contract, and he is, therefore, entitled to recover back what he has so paid. *Basford v. Pearson*, 9 Allen, 387. If it had been a payment in money, it would be too plain to be controverted. A payment in labor and services, of which the other has secured the benefit, stands upon the same ground.

Judgment for the plaintiff.

BURPEE V. SPARHAWK.

(108 Mass. 111.)

Bankruptcy — impeaching discharge in State court.

A creditor who was fraudulently omitted from the schedule filed by a bankrupt in proceedings under the bankruptcy act, and who had no actual knowledge of the proceedings until after a granting of a discharge to the bankrupt, applied to the United States district court, under section 34 of the act, to annul the discharge for that cause. *Held*, that he could not afterward impeach the discharge in an action on his debt in a State court.

THIS was an action in tort commenced in 1865. While it was pending the defendant, in 1867, on his own petition, obtained a discharge under the United States bankruptcy act of 1867. Subsequently he pleaded his discharge as a bar of further proceedings in this case. The plaintiffs filed a replication denying the validity of the discharge on the ground that it was obtained by fraud, in that the defendant fraudulently omitted their names from the schedule of his debts filed in the bankruptcy proceedings, and that they had no notice of these proceedings till after the discharge. During the further pendency of the case the plaintiffs filed a petition in the United States district court under section 34 of the bankrupt act, to set aside and annul the discharge on the same grounds specified in the replication, and the parties had a hearing in the district court on the petition which is not furnished.

This case was brought to trial in 1871, and the plaintiffs, against the objection of the defendant, was permitted to go to the jury upon the following issue :

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“Did the defendant willfully omit the names of the plaintiffs from his schedule of creditors in the proceedings wherein he obtained his discharge, with a purpose by so doing of preventing the plaintiffs from having the means of notice or knowledge of such proceedings, and participation in their benefit to his creditors?” The jury found upon the issue in the affirmative; and thereupon the court ordered judgment for the plaintiffs upon the former verdict, and the defendant alleged exceptions.

P. E. Aldrich, for defendant.

G. F. Verry, for plaintiffs.

GRAY, J. In *Way v. Howe*, *post*, after full consideration of the able arguments made in that case and in this, it has been adjudged that a certificate of discharge granted by the district court of the United States under the bankrupt act of 1867, ch. 176, could not be impeached in an action brought in the courts of this Commonwealth (upon a debt not falling within either of the classes excepted in section 33, and which was provable against the estate in bankruptcy) on account of a fraudulent conveyance of property by the bankrupt, which would by section 29 invalidate the discharge; and that the only mode of relief was by application to the district court of the United States, under section 34, to set aside and annul the discharge.

Another of the cases mentioned in section 29 in which “no discharge shall be granted, or, if granted, shall be valid,” is “if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact.” It is upon this clause that the plaintiffs rely, and there can be no doubt that it covers the case of the fraudulent omission of a creditor in the schedule of debts, verified by oath, which the bankrupt is obliged by sections 11 and 42 to file at the commencement of the proceedings in bankruptcy.

The plaintiffs contend that a creditor whose debt is fraudulently omitted in the schedule, and to whom, therefore, no notice of the bankrupt’s application for a discharge is sent by mail under section 20, is not a party to the proceedings in bankruptcy, or barred by

any decision of the United States court in the matter of the discharge. And so it has been held by the supreme court of Vermont, upon the ground that, having no notice of the proceedings, he could not be affected by them. *Batchelder v. Low*, 43 Vt. 662.

On the other hand, it is to be observed that a creditor, whose debt is omitted from the schedule by mistake and without fraud, has no more notice of the proceedings in bankruptcy than if the omission was fraudulent, and yet an innocent omission does not affect the validity of the discharge. *Burnside v. Brigham*, 8 Metc. 75; *Re Needham*, 1 Low. 809. Section 29 requires that, in addition to the notice by mail to all creditors mentioned in the schedule, notice shall be given by publication in the newspapers of the bankrupt's application for a discharge, which is equivalent to the only notice to other persons interested in the estate, after the publication of which they are bound at their peril to take notice of the issuing of the warrant and the proceedings under it, whether they had or had not any actual knowledge thereof. *Stevens v. Mechanics' Savings Bank*, 101 Mass. 109. Any creditor, whose debt is provable, whether it was proved or not, may object to the granting of the discharge, or apply to the United States court, sitting in bankruptcy, to have it set aside or annulled. U. S. Stat. 1867, ch. 176, §§ 31 and 34; *Book's case*, 3 McLean, 317; *In re Sheppard*, 1 Bankr. Reg. 115; *Re Murdock*, 1 Low. 362. The cause relied on for impeaching the discharge in this case, like that alleged in *Way v. Howe*, above cited, is one of those specified in section 29, and it is insisted by the defendant that the same rule must apply to the one case as to the other. And it has been so held by the court of appeals of Kentucky. *Payne v. Able*, 7 Bush, 344.

But we are not required in this case to decide the general question of the effect of a certificate of discharge in bankruptcy against a creditor, fraudulently omitted in the schedule, and having no actual notice of the proceedings in bankruptcy; for such a creditor may waive the want of notice, and make himself a party to those proceedings; and we are of opinion that the plaintiffs by applying to the district court of the United States, under section 34, to set aside and annul the discharge for the same cause upon which he relies in this case, have voluntarily made themselves a party to the proceedings in bankruptcy, and submitted the question of their right to impeach the validity of the discharge for

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thi use to the jurisdiction of that court, and cannot, therefore, now impeach it by any other court or proceeding.

The case falls within the same principle which has been applied to many others. For example, a citizen of another State, who proves his debt in the course of proceedings under a State insolvent law, which could not constitutionally bind him without his assent, cannot afterward impeach the validity of the certificate of discharge granted upon those proceedings, except as allowed by that law. *Clay v. Smith*, 3 Pet. 411; *Gilman v. Lockwood*, 4 Wall. 409; *Journey v. Gardner*, 11 Cush. 355. And a creditor, whose debt is of such a class, either by reason of its fiduciary character or otherwise, that it would not be barred by any discharge in bankruptcy, still, if he elects to prove it against the estate, cannot afterward, unless his proof is withdrawn by leave of the bankruptcy court, insist upon his exemption from the effect of the discharge. *Chapman v. Forsyth*, 2 How. 202, 209; *Ex parte Tebbetts*, 5 Law Reporter, 259; *Morse v. Lowell*, 7 Metc. 152; *Fisher v. Currier*, id. 424; *Gilbert v. Hebard*, 8 id. 129.

Exceptions sustained.

LOOK V. DEEN.

(108 Mass. 116.)

False imprisonment — arresting insane person without warrant.

An officer is not authorized to arrest a man without a warrant, on the ground that he is insane, unless he is dangerous.

TORT for unlawfully arresting and imprisoning the plaintiff on two several occasions. The answer was a general denial, together with the following special matter: That the defendant is and was a constable of the Commonwealth, and as such was in attendance upon the camp meeting, held for religious purposes at Martha's Vineyard; that the plaintiff was present at such meeting, and while such meeting was holding, engaged in loud and boisterous talk, and made great outcries, and conducted himself in a wild and disorderly manner, gathering about him a great crowd, and disturbing the

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meeting; that defendant saw him making such disturbance, and requested him to desist therefrom, and prevailed upon him, by his requests, to cease making such disturbance, and went with him to a cottage on the premises, and left him there; that in so doing the defendant had no malicious feelings toward the plaintiff, and no intention of restraining him of his liberty; and that, if any of his acts in so doing amounted to an arrest or imprisonment, he did the same by virtue of his authority as constable aforesaid, and in order to suppress said disturbance of the peace of said meeting, and he restrained the plaintiff of his liberty only so long as was necessary to suppress said disturbance, which the plaintiff was then and there making.

“And the defendant further says that the plaintiff, at the time and place aforesaid, was insane, and incapable of taking care of himself, and was conducting himself in a wild and irrational manner, and the defendant prevailed upon him to cease from such disorderly conduct, and to retire to a place of quiet; and if in so doing he in any manner restrained the plaintiff of his liberty, he did so without malice toward the plaintiff, and because the plaintiff, by reason of his insanity, was incapable of taking care of himself; and the defendant did only what was, as he believed, for the welfare and safety of the plaintiff.”

Trial and verdict for the plaintiff in the superior court, before WILKINSON, J., who allowed a bill of exceptions, of which the following is the material part:

“It appeared in evidence that the defendant was a deputy of the constable of the Commonwealth, and, acting as such, was present, with other deputies, at or near a Methodist camp-meeting on Martha's Vineyard in August, 1869, being assigned more particularly to duty immediately outside the camp-ground, upon Oak Bluffs, a settlement occupied by summer residents; and that the plaintiff, with the intention of attending said camp-meeting, went from Hyannis on August 19, in a steamboat, and landed the same day at Oak Bluffs' Landing, from a quarter to a half mile from the camp-grounds, that being the usual landing for persons going to the camp-meeting.

“The plaintiff, in support of his first count, offered evidence tending to show that, about half an hour after his arrival, and while he was at Oak Bluffs, about a quarter of a mile from the camp-ground, and while he was engaged in reading from his Bible,

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and talking to a collection of people about him, he was arrested by the defendant, and taken to the headquarters of the State police, within the camp-ground, and left within that building. And, in support of his second count, the plaintiff offered other evidence, tending to show that, while he was on the steamboat, the next morning, returning to Oak Bluffs from New Bedford, whither he had gone the previous evening, he was again arrested by the defendant, who was also on the boat, and was kept imprisoned till the arrival of the boat, when he was taken to a lock-up on the camp-ground, and there kept during that day. The plaintiff also testified that he repeatedly demanded to know why he was arrested, and to be taken before a magistrate, and to see the complaint against him, if he was charged with any offense; but that no cause was shown or made known to him.

“The defendant then offered evidence of the acts and sayings of the plaintiff while at a camp-meeting at Yarmouth on the two days previous to the first alleged arrest, for the purpose of proving his insanity, and that he was a monomaniac; and also of his acts and sayings on the Sunday previous, while having a will executed, for the purpose of proving his insanity; but the judge rejected all this evidence.

“The defendant requested the judge to rule that, if the plaintiff was insane, and the defendant, honestly believing that the welfare of the plaintiff demanded that he should go from the crowd, to which he was talking, to a place of quiet near by, took him forcibly to such place, using no more force than was necessary for the purpose, and acting from no other motive than a desire to assist and protect the plaintiff, such act would not be an assault, nor an unlawful arrest or imprisonment. The judge declined to give this instruction, but instructed the jury that, if the plaintiff was insane, the officer had a right to arrest him, but it would, in such case, be his duty immediately to take proper steps to have him committed to a lunatic hospital, and if he failed to do so, he would be liable from the beginning for the arrest.

“The defendant was asked by his counsel, for the purpose of justifying his acts toward the plaintiff, if in his transactions with the plaintiff he was acting under the direction of any superior officer, and if so, of whom. But this evidence was held inadmissible for that purpose. He was also asked by his counsel, for the purpose of justifying or excusing his acts toward the plaintiff, whether at the

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time of the alleged arrests the mind of the plaintiff was, in his opinion, in a normal or abnormal condition, and whether the plaintiff was sane or insane. But the judge ruled that this evidence was not admissible for that purpose. The defendant also offered to prove that the plaintiff was actually committed by another State constable to the State lunatic hospital at Taunton on August 31 following; but the judge refused to admit the evidence, unless the defendant could show that the plaintiff was lawfully so committed."

J. Brown, for defendant. An insane person may lawfully be arrested and restrained of his liberty. *In re Oakes*, 8 Law Rep. 122; Evidence of the unsoundness of his mind immediately before and afterward is admissible to prove its derangement at the time of the arrest. 2 Greenl. Ev., § 690; *Dickinson v. Barber*, 9 Mass. 225; *Peaslee v. Robbins*, 3 Metc. 164. The officer's opinion of the plaintiff's state of mind was admissible to show his own intent in making the arrest, or at least in mitigation of damages. *Commonwealth v. Presby*, 14 Gray, 65, 67. It was discretionary with the officer, after making the arrest, whether to commit the plaintiff to a hospital. If his failure to do so rendered him liable, he should have been allowed to prove that he was acting under the direction of an official superior; for that fact was at all events admissible to mitigate damages.

G. Marston and C. W. Clifford, for plaintiff.

CHAPMAN, C. J. The question which this case presents arises upon the defendant's request for instructions, and the instructions that were actually given. The defendant asked the court to rule that if the plaintiff was insane, and the defendant, honestly believing that the welfare of the plaintiff demanded that he should go from the crowd, to which he was talking, to a place of quiet near by, took him forcibly to such place, using no more force than was necessary for the purpose, and acting from no other motive than a desire to assist and protect the plaintiff, such act would not be an assault nor an unlawful arrest or imprisonment. The court declined to give this instruction, but instructed the jury that, if the plaintiff was insane, the officer had a right to arrest him, but it would in such case be his duty immediately to take proper steps to have him committed to a lunatic asylum, and if he failed to do so he would be liable from the beginning for the arrest.

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Both the request and the instructions assume that he was neither dangerously insane, nor disturbing the peace, but was merely insane. The defendant was a deputy of the State constable, but his office gave him no authority over the plaintiff. He had only such authority as any private person would have. The right which every citizen has to enjoy personal liberty is necessarily subject to some exceptions. Most of these exceptions are enumerated in *Colby v. Jackson*, 12 N. H. 526, and the authorities there cited. Among them are the right to restrain a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens, or is so insane as to be dangerous to himself or others. In such cases the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity. As to insane persons who are not dangerous, they are not liable to be thus arrested or restrained by strangers. Bac. Abr., Trespass, D.; *Anderdon v. Burrows*, 4 C. & P. 210; *Scott v. Wakem*, 3 Fost. & Finl. 328; *Fletcher v. Fletcher*, 28 L. J. N. S. (Q. B.) 134; *In re Oakes*, 8 Law Rep. 122. There is no reason why they should be thus liable, for it is well known that many persons who are insane, and especially monomaniacs, are as harmless as any other persons, and are not deemed proper subjects for treatment in a hospital. The request for instructions was properly refused.

We need not in this case discuss the question whether the defendant would have had the right, as stated in the instructions given, to take up the plaintiff, he not being a dangerous person, provided he had taken the proper steps to have him committed to a lunatic hospital, for he took no such steps. There was no legal justification for the acts of the defendant.

It is elementary law that one who would justify himself under a statute must pursue the statute. The question put to the defendant as a witness, by his counsel, whether he was acting under the direction of any superior officer, was properly ruled to be inadmissible, because he did not proceed under the statutes, but merely held the plaintiff for a while, and then released him. A superior officer could not authorize this course.

The question whether in his opinion the mind of the plaintiff, at the time of the arrest, was in a normal or abnormal condition, and whether the plaintiff was sane or insane, was also inadmissible,

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because the fact itself was immaterial, it not being pretended that the defendant was acting under the statutes.

The subsequent commitment of the plaintiff to the hospital by another constable was a separate matter, and could not have justified the defendant, even if it had been legal.

Exceptions overruled.

MAY V. RICE.

(108 Mass. 189.)

Landlord and tenant. Tenancy at will. Notice to quit. Lease at "same rate." Taxes.

Defendant hired of plaintiff a store for one year, from June 1, 1868, for a certain annual rent, payable quarterly, and the taxes. In May, 1869, defendant told plaintiff that he was looking for another store, but would like to remain, after the year, "at the same rate," either party to terminate the tenancy by one month's notice, in writing. Plaintiff assented. On June 1, 1869, defendant sent to plaintiff a notice, in writing, that he should "leave the store on July 1." The plaintiff being absent the notice was put in his office letter-box, where he found it the next day. In an action for a quarter's rent, and the taxes for 1869, *held*, (1) that the notice, under the agreement, need not expire at the end of the quarter, but might be given at any time during the tenancy; (2) that the notice took effect only from the time when the plaintiff received it, and on July 2; (3) that defendant was liable to pay only such a proportional part of the annual rent and taxes as a month and two days bore to a twelve-month.

ACTION of contract against Freeman Rice and Edwin Rice, partners, to recover one-quarter's rent of a store, from June 1, 1869, and the taxes for 1869. The trial-judge reported the case for the determination of this court substantially as follows:

The plaintiff was the owner of a store on Broad street in Boston, and leased it orally to the defendants for one year, from June 1, 1868, for a rent of \$3,200 per year, payable quarterly, and the taxes. "In May, 1869, an interview was had between the parties, in which something was said about a renewal for another year, but none was determined upon, as the defendants stated they were looking for a new store; but it was agreed that they might remain

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there at the same rate, and that either party might terminate the tenancy by giving one month's notice to the other in writing. On June 1, 1869, in the morning, the defendants paid to the plaintiff the quarter's rent due that day, and in the afternoon of the same day, having procured the lease of another store during that day, and after paying the rent, wrote a letter to the plaintiff" notifying him that they should leave the store on July 1. "This letter was sent by them to the plaintiff by one of their clerks. The clerk went to the plaintiff's office, and found the door locked, but on the outside of it a writing, put there by the plaintiff, requesting any person having notes for him to leave them in his box in a store below stairs. The clerk thereupon took the letter and deposited it in the box, where the plaintiff found it the next day. The defendants left the store on June 30, and sent the key to the plaintiff, who refused to receive it. The taxes paid by the plaintiff on the store for the year 1869 were \$575.40, and he paid \$10.50 for resetting glass broken while the defendants occupied, and for which they would have been liable. A demand was made for the rent and taxes claimed, before the commencement of this suit. Upon these facts the court are to render such judgment as they may see fit.

H. A. Clapp, for plaintiff.

N. Morse, for defendants.

MORTON, J. For a year prior to June 1, 1869, the defendants occupied the plaintiff's store under a tenancy at will, which by its own limitation terminated on May 31, 1869. The report states that "in May, 1869, an interview was had between the parties, in which something was said about a renewal for another year, but none was determined upon, as the defendants stated they were looking for a new store; but it was agreed that they might remain there at the same rate, and that either party might terminate the tenancy by giving one month's notice to the other in writing." This agreement undoubtedly created a tenancy at will commencing June 1, 1869. But a tenancy at will may be terminated, not only in the manner provided by the statute, but at any time and in any mode mutually agreed upon by the parties. *Farson v Godale*, 8 Allen, 202. As the parties in this case have entered into a contract as to the time and mode of terminating the tenancy,

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their rights are to be determined by the fair construction of that contract, and not by the technical rules which apply to the termination of a tenancy at will where there is no contract on the subject. The stipulation between these parties was "that either party might terminate the tenancy by giving one month's notice to the other in writing." By the natural import of this language, we think that either party may give written notice to the other at any time, and the tenancy be terminated at the expiration of one month therefrom. There is no provision in the contract that the month's notice shall expire at the end of a quarter, or of a calendar month; and we ought not to introduce into it, by implication, such stipulation, unless it clearly appears from the whole contract that such was the intention of the parties. And we are not able to see, either in the contract or the situation of the parties, any thing which indicates that such was their intention. The lease was not for a year, or a quarter, or a month, but for an indefinite period, and both parties knew that the defendants, when the contract was made, were engaged in looking for another store.

Under all the circumstances, it seems to us that it was contemplated by the parties, and is the true construction of their contract, that the month's notice might be given at any time.

The case of *Baker v. Adams*, 5 Cush. 99, cited by the plaintiff, does not conflict with this decision. It recognizes the principle here applied, but the court was of opinion that the contract and circumstances of the parties, in that case, showed an intention that the notice provided for in the contract should expire at the end of a year of the term. The facts of the case were entirely different from those of the case at bar.

It follows from these considerations, that the defendants' tenancy, and their liability to pay rent, terminated at the expiration of one month after they gave the plaintiff notice in writing. But we do not think that dropping the notice into the plaintiff's box, as stated in the report, was a proper service upon him. He did not receive the notice until the next day, namely, June 2, and we think it must take effect from the time he actually received it. The result upon this branch of the case is, that the plaintiff is entitled to recover rent for one month and two days, at the rate agreed upon by the parties.

The plaintiff contends that the defendants are liable for the whole of the taxes for the year 1869, but we are of opinion that

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this claim is not consistent with the contract. The defendants were to pay for their occupancy "at the same rate" they had paid the previous year. They had paid for the whole of the previous year \$3,200 and the taxes. If for a month's occupancy they are required to pay a twelfth of \$3,200 and the whole of the taxes for the year, they pay not at the same, but at a much greater rate or proportion for the time they occupy than they had formerly paid. The contract of the parties divides the taxes as well as the rent, and the defendants are obliged, under it, to pay a proportional share of the taxes, according to the time they have occupied.

The result of the whole case is, that the plaintiff is entitled to recover, in addition to the charge of \$10.50 for broken glass, which is admitted to be due, the same proportion of the gross rent ascertained by adding the taxes of 1869, to \$3,200, which one month and two days bears to the twelve months, with interest from the date of the writ.

Judgment for the plaintiff accordingly.

VOSE V. DOLAN.

(108 Mass. 155.)

Deed — filling blanks in.

Plaintiff sold to defendant, by deed, a lot of gravel according to specifications and profiles made by a surveyor. Blanks were left in the deed for the quantity of gravel and the sum to be paid, and the parties orally agreed that the surveyor should fill them up after ascertaining the quantity. *Held*, that he might do so after the delivery of the deed, and in the plaintiff's absence.*

TORT for the conversion of a lot of earth, gravel and stone. The case was referred to an arbitrator, who reported substantially as follows:

The parties agreed in writing on March 14, 1861, that the defendant should make certain streets, and remove the earth and gravel in certain mounds or knolls on the plaintiff's estate; and the defendant began the work, but had not finished removing all the earth

* See *Upton v. Archer*, 10 Am. Rep. 268, and note.

and gravel on April 14, 1864. The plaintiff offered to prove that on that day the parties signed and sealed an instrument in duplicate, of which the following is all that is material:

“Memorandum of an agreement made this fourteenth day of April, 1864, by and between Thomas Dolan and Francis Vose witnesseseth, that on the fourteenth day of March, 1861, the said parties entered into an agreement in writing in reference to making certain streets and excavating and removing certain mounds and knolls on an estate of said Vose, in Dorchester, according to specifications therein set out, and certain profiles made by Alexander Wadsworth, and therein referred to, which said agreement may be referred to in connection with this memorandum; and whereas said agreement has not been fully performed by said Dolan, and much earth and gravel contemplated by the parties to said agreement to have been removed according to said specifications and profiles still remain on the premises aforesaid, the said Vose, in consideration of

, paid by the said Dolan, hereby sells, transfers and conveys to the said Dolan all the remaining earth and gravel on said premises, which the parties under said agreement intended should be excavated and removed according to the aforesaid specifications and profiles, after completing and grading the streets named in said agreement as herein set forth, and being in quantity

. The said Dolan, in consideration of the said sale and transfer, hereby promises and agrees that he will faithfully and fully, and to the satisfaction of said Wadsworth, execute and complete all the filling, excavating and grading, contemplated and agreed by him to be performed in the aforesaid agreement, and in the manner therein specified, on or before the first day of August, 1864, and will forfeit all right to all earth or gravel which shall remain on said premises on said first day of August, 1864, and which ought to have been removed by him in the due and proper execution of said agreement.”

The plaintiff further offered to prove that the defendant then made his two promissory notes, each for the sum of \$500, and delivered them to the plaintiff, in part payment for the earth, gravel and stone, and signed another note, and handed it to Wadsworth, who was a surveyor, a blank being left therein for the amount; that the quantity of earth, gravel and stone remaining had not then been ascertained; that it was agreed by the parties that Wadsworth should measure and ascertain the quantity, and should fill the blank

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in the note by inserting the total price of the earth, gravel and stone, at \$1.25 per square, less the sum of \$1,000, the amount of the two notes of \$500 each; that the said instrument of two parts was then executed by the parties, the one being taken by the defendant, and the other by Wadsworth; that blanks were left in each copy for the number of squares sold and the considerations; that these blanks were to be filled by Wadsworth, when he should ascertain the quantity; that Wadsworth did within a short time ascertain by measurement the quantity to be 1,808 squares, and the price thereof to be \$2,260, and caused to be inserted in the note the words "twelve hundred and sixty," before the word "dollars," and in the copy of the instrument which he had retained, the words "eighteen hundred and eight squares," as the quantity sold, and the words "twenty-two hundred and sixty dollars," as the consideration for the sale; and that the blanks in the copy taken by the defendant have not been filled. To the admission of this evidence, and to the introduction in proof of the instrument and of the note, the defendant objected. But the objection was overruled. It appeared that the defendant had no notice of Wadsworth's intention to fill the blanks, or of how he intended to fill them.

The referee found "that by the instrument aforesaid, the defendant was bound to remove the earth, gravel and stone, which he had purchased, by August 1, 1864; that he failed to remove 700 squares, through no default of the plaintiff; that he thereupon ceased to have any right of property in the 700 squares, and was a wrongdoer in afterward removing and appropriating them to his use, that the 700 squares were of the value of \$875; that the plaintiff was entitled to judgment for that sum, and interest, and his costs of court; but that if the court should be of opinion that the above evidence should not have been received, or that upon the evidence the instrument was not the deed of the defendant, the plaintiff should take nothing by his writ, and the defendant should recover his costs of court."

The superior court ruled that the evidence was properly received, and that the instrument was the deed of the defendant, and ordered judgment to be entered for plaintiff for the amount found by the referee. The defendant alleged exceptions.

W. Colburn, for defendant.

C. Allen, for plaintiff.

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COLT, J. Upon the question submitted by the report of the referee, we are clearly of opinion that evidence of the means taken to ascertain the quantity of earth, gravel and stone which was to be removed under the contract of April 14, and of the subsequent filling of the blanks in the note and sealed instrument with the ascertained amounts, was properly received by him; and that the instrument containing the terms of the contract was binding upon the defendant as his deed, notwithstanding the subsequent filling of the blanks. It was a completed, intelligible contract when it was executed. The existence of the blanks did not impair its validity. The quantity of earth sold was definitely indicated by reference to specifications and profiles, and it was not necessary to state the number of squares sold or the price to be paid for them. That was a matter of computation from data given. If the blanks had been left, the rights of the parties would have been the same as if filled before delivery. The alleged alteration of the instrument was therefore an immaterial alteration, in no way changing its terms or enlarging the defendant's liability under it. There is no pretense that it was fraudulently made; on the contrary, the blanks were filled by the surveyor, in accordance with the agreement of the parties at the time the deed was executed.

It is now well settled that an immaterial alteration of a sealed instrument, not fraudulent, will not invalidate it, though made by the party claiming under it. *Brown v. Pinkham*, 18 Pick. 172; *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12; *Chessman v. Whittemore*, 23 Pick. 231; *Adams v. Frye*, 3 Metc. 103. The case is not within those in which it is held that blanks in a deed constituting a material part of the instrument itself cannot, in the absence of the maker, be filled by parol authority, because authority to make a deed must be given by deed. *Burns v. Lynde*, 3 Allen, 305; *Basford v. Pearson*, 9 id. 387.

Exceptions overruled.

Bronson v. Coffin.

BRONSON v. COFFIN.

(108 Mass. 175.)

Covenant — running with the land. Incumbrance. Measure of damages.

The owner of a farm conveyed to a railroad company a strip of it by a deed containing this clause: "I hereby covenant that I and my heirs and assigns will make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory on me and all persons who shall become owners of the land on each side of said railroad."

Held, (1) that this covenant gave to the railroad company an interest in the nature of an easement in the grantor's adjoining land, and ran with that land, and was an incumbrance within the meaning of the covenant against incumbrances in a subsequent conveyance thereof; (2) that the obligation to maintain the fence was not impaired by the omission to perform it for twenty years, without any evidence of its having being released or extinguished; (3) that an action for a breach of the covenant against incumbrances in the second deed was not barred by the statute of limitations until twenty years after the date of that deed; (4) that the fence was to be maintained on each side of the railroad, and wholly on the land retained by the grantor in the first deed; (5) that the measure of damages for a breach of the covenant against incumbrances was a just compensation for the real injury resulting from the incumbrance, to be estimated by the difference in the fair market value of the estate by reason of the existence of the incumbrance, and taking into consideration the cost of fencing, so far only as it exceeded the cost of any fences which the situation and circumstances of the estate would otherwise have required the maintenance of.

CONTRACT upon the covenant against incumbrances, contained in a deed from the defendants to the plaintiff, dated May 24, 1866. Trial in the superior court, before PUTNAM, J., who made the following report thereof:

"The land in question was situated in New Bedford, and came to the defendants under the will of the late Timothy G. Coffin, and was a portion of his farm.

"On April 6, 1839, the said Coffin conveyed a strip of land fifty-five rods in length and four and three-tenths rods wide, running through the land in question, to the New Bedford & Taunton Railroad Company, by a deed which contained the following clause: 'I, the said T. G. Coffin, hereby covenant that I and my heirs and

assigns will make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory upon me and all persons who shall become owners of the land on each side of said railroad.'

"The defendants contended that this clause did not constitute an incumbrance on the land, but created merely a personal obligation. But the judge, for the purposes of the trial, ruled that it did constitute an incumbrance upon the whole of the land now owned by the plaintiff, and which he held under said deed. To this ruling the defendants excepted.

"The case then proceeded to the jury, upon the amount of the plaintiff's damages.

"Upon the point of what would constitute a 'sufficient fence' within the clause named, the defendants requested the judge to rule that that would be a sufficient fence which the statute had denominated as a sufficient fence between adjoining proprietors under the Gen. Sts., ch. 25, § 1. The judge declined to rule as requested; but did rule that a 'sufficient fence,' within the meaning of the clause, need not necessarily be any better than such fences as adjoining proprietors of improved land are required to make and maintain under the statute, but that it must be a fence reasonably sufficient to keep animals from straying from the plaintiff's land on to the line of the railroad. To this ruling the defendants excepted.

"The defendants further asked the judge to rule that upon a proper construction of the deed it did not appear that the obligation, if any, meant an obligation to make and maintain a division fence on each side of the line of the land conveyed to the railroad. The judge ruled otherwise, and the defendants excepted.

"Evidence was offered on both sides as to the cost of building and maintaining fences of wood and stone, reasonably sufficient for the purposes named in the last ruling; and also evidence of experts as to how far the existence of what was thus claimed by the plaintiff to be an incumbrance would affect the market value of the land; the experts including in their estimates the cost of building and maintaining the fence.

"It appeared that when the plaintiff bought he knew nothing of the existence of this incumbrance, but that he had since built a wall along a portion of the line between his land and that of the railroad; and the superintendent of the railroad company testified

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that they should not release the plaintiff from the obligation in the deed; but there was no evidence as to whether said company had or had not ever made any request concerning a fence, or whether any refusal had been made to build one, nor in any way concerning the relations between the railroad and said plaintiff and his grantors, including said Timothy G. Coffin, or any acts or conduct of theirs adverse to the rights of the railroad, nor concerning the use or improvement or mode of occupation of the premises prior to the plaintiff's purchase, nor whether there had been a need of any fence prior to the plaintiff's purchase, nor whether the fence had been often or never renewed; but the plaintiff testified that at the date of his purchase in 1866 there was an old fence near the line of the railroad, but not on it, and running but a short distance; and there was evidence that at the date of the plaintiff's purchase certain fences existed on the plaintiff's land to the west of the railroad.

"The defendants requested the judge to rule as follows:

"That if, during the whole period from the time of giving the deed to the corporation in 1839 to the date of the plaintiff's deed in 1866, the plaintiff's grantors and those who had preceded them as owners of the plaintiff's land, and no other persons, have in any part performed what was stipulated in the deed to the corporation, and had not been required or requested to perform it by the corporation then, a period of more than twenty years having elapsed, the right of the railroad to require performance is barred by the statute of limitations, and the incumbrance, if any, had ceased; that under such a state of facts the corporation could not enforce the contract expressed in the deed, whether regarded as a personal undertaking of the grantor or as an incumbrance on the land.

"That the plaintiff must show either that he had been compelled to pay damages, or that he is now legally bound under the deed to the corporation to maintain the fence or pay damages; and that upon this question the statute of limitations applied.

"That the proper measure of damages is what the railroad corporation could recover in an action for a failure to perform the stipulation contained in the deed, regarded as an incumbrance.

"That as, at the time of the conveyance by the said Timothy G. Coffin to the railroad company, such corporations were not bound by law to fence their roads, the only obligation created by the clause would be at the most, the cost of building and maintaining one-half of the division fence.

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"The judge declined to give the rulings as requested; but did instruct the jury, for the purposes of the trial, that the plaintiff was bound by this clause in the deed to build and maintain perpetually a 'sufficient' fence (having duly instructed them as to what was meant by a 'sufficient' fence) on both sides of the railroad, and for its whole length; that this constituted an incumbrance on the whole of the plaintiff's land which he now owned on both sides of the railroad (the same being in fact the land purchased of said defendants by the said deed); that the rule of damages for the breach of the covenant against this incumbrance was a just compensation for the real injury resulting from such incumbrance; that, in determining this question, they were not alone to consider the cost to the plaintiffs of building and maintaining such fence, but were also to inquire how far the existence of this incumbrance impaired the value of the estate to the owner, and what would be the difference in its fair market value, by reason of the existence of this incumbrance—including in the depreciation, if any, the cost of building and maintaining the fence, and not treating that as an additional item—and upon the whole evidence allow him a just compensation for the real injury thus sustained. To these rulings and refusals to rule the defendants excepted."

The jury returned a verdict for the plaintiff in the sum of \$1,140, which, by the terms of the report, was to stand, or be set aside, and a new trial had upon such rulings as this court should determine to be proper.

J. Brown, for defendants.

T. M. Stetson, for plaintiff.

GRAY, J. The deed made by Timothy G. Coffin to the New Bedford and Taunton Railroad Company, in 1839, conveyed a strip of land between four and five rods wide, and bounded on each side by the lands retained by Coffin, and afterward granted by his devisees to the plaintiff; and contained this clause: "I, the said T. G. Coffin, hereby covenant that I and my heirs and assigns will make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory upon me and all persons who shall become owners of the land on each side of the railroad."

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The principal question in the case is, whether the obligation thus expressed, to maintain a division fence between the land granted and the adjoining lands of the grantor, created a charge upon those lands, binding upon any assignee thereof, either by way of covenant running with the lands, or grant of an interest in the nature of an easement therein, which constituted an incumbrance, within the meaning of the covenant against incumbrances in a subsequent deed thereof from the grantor, or those claiming title under him.

“On general principles,” said Chief Justice PARSONS, “every right to or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee in it by the conveyance, must be deemed in law an incumbrance.” *Prescott v. Trueman*, 4 Mass. 627, 629.

Words sounding in covenant only may operate by way of grant of an easement, wherever it is necessary to give them that effect in order to carry out the manifest intention of the parties. Bro. Ab. Covenant, 2; *Holms v. Seller*, 3 Lev. 305; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Greene v. Creighton*, 7 R. I. 1; *Norfleet v. Cromwell*, 64 N. O. 1.

In order to make a covenant run with the land of the covenantor, and bind his heirs and assigns, the covenantee must, according to all the authorities, have such an interest in that land as to amount to a privity of estate between the parties to the covenant. In this Commonwealth, at least, it is not necessary that their relation should be that of landlord and tenant; but an interest in the nature of an easement in the land which the covenant purports to bind, whether already existing, or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon that land, for the support and protection of that interest, and the beneficial use and enjoyment of the land granted, run with the land charged. And an obligation, duly expressed, that the structures upon one parcel of land shall forever be of a certain character for the benefit of an adjoining parcel is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other.

In *Hurd v. Curtis*, 19 Pick. 459, several owners of mills drawing water from the same stream by means of one dam, for themselves, their heirs, administrators and assigns, mutually cove-

nanted with each other, that each of the mills should have wheels of a certain construction and limited power; and a party to the indenture brought an action on this covenant against a subsequent purchaser of some of the mills, who was not himself a party to the indenture. Mr. Justice WILDE very clearly stated the rule, as follows: "As there is no privity of contract between the plaintiff and the defendants, it follows that the defendants are not liable in this action, unless there is a privity of estate between them. Where such a privity exists between the covenantor and the covenantee, and the covenantor assigns his estate, the privity thereby created between the assignee and the other contracting parties renders the former liable on all such covenants as regulate the mode of occupying the estate, and the like covenants concerning the same; and so if the covenantee assigns his estate his assignee will have the benefit of similar covenants. These covenants are annexed to the land and run with it. But if there is no privity of estate between the contracting parties the assignee will not be bound by, nor have the benefit of, any covenants between the contracting parties, although they may relate to the land he takes by assignment or purchase from one of the parties to the contract. In such a case the covenants are personal and are collateral to the land." And it was held that the action could not be maintained, solely because there was no privity of estate between the covenanting parties, but their estates were several, and there was, upon the true construction of the peculiar terms of that indenture, no grant of any interest in the real estate of either party, to which the covenants could be annexed.

So in *Plymouth v. Carver*, 16 Pick. 183, land was conveyed upon condition that the grantees should become bound by sufficient bond to make and maintain a portion of the highway passing by the land; and the grantees gave bond accordingly, for themselves, their heirs, executors, administrators and assigns. This bond was held not to be a covenant running with the land, because the only condition in the deed was that the grantees should give bond to maintain the highway, and upon their giving such a bond the estate vested in them absolutely, and the grantor had no longer any interest in the land, and no right or estate therein was conveyed by them to him, so that there was no privity of estate between the parties to the covenant, and no land with which the covenant could run; and the bond was but a personal obligation of the obligors, not subjecting

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the land which had been conveyed to them in any other way than any of their estate might be liable to the performance of their personal covenants or obligations.

In *Wheelock v. Thayer*, 16 Pick. 68, the action was against the original covenantor, and the question was whether, in a grant of a privilege of drawing water from a pond, a covenant respecting the same would support an action by an assignee of the grantee; and it was held that it would not, for the reason that it was a mere covenant in gross, and not for the benefit of any land of the covenantee, and therefore not assignable.

In *Morse v. Aldrich*, 19 Pick. 449, and 1 Metc. 544, the owner of a tract of land and a mill-pond conveyed a portion of both by metes and bounds, with liberty to enter upon the rest to dig and carry away the whole or any part of the soil. After the grantee had conveyed the same premises to the plaintiff, the original grantor, by indenture with the plaintiff, covenanted to draw off his pond six days in August and September in each year, upon the plaintiff's request, for the purpose of giving the plaintiff an opportunity of digging and carrying out mud from the pond. The covenantor died and his estate descended to his heirs, of whom one conveyed his share to the others. It was held that, this covenant being made for the purpose of securing to the plaintiff the full benefit of the land granted to him, and there being a privity of estate in the rest of the land between the parties to the covenant at the time it was made, it ran with the land; and that the heirs and assigns of the covenantor, though not named, were liable to an action thereon for neglecting to draw off the pond after being requested so to do.

But perhaps the strongest case in this court, in favor of the position that the clause in question in Coffin's deed was strictly a covenant running with the adjoining lands, is *Savage v. Mason*, 3 Cush. 500. In that case, an indenture of partition between the owners in common of a large tract of land contained mutual covenants, which it was expressly declared should be binding upon and be available to heirs and assignees, and should be deemed perpetual and fundamental, and to run with the land thereby divided. One of these covenants was, that the centre of party walls of every brick or stone building might be placed upon the lines dividing the lots from contiguous lots, and that the owner of such contiguous lots, whenever he should make use of the same in any building, should pay for one-half of the wall by him so used. A lot set off to one of the parties

to the indenture was conveyed by his heirs to persons who afterward conveyed it to another person, who entered and took possession and built a brick dwelling-house thereon, and placed the center of the party wall of one side thereof upon the line dividing this lot from the contiguous lot, and then conveyed the lot with the dwelling-house thereon to persons who again conveyed to the plaintiffs. The contiguous lot was set off by the partition to another of the parties to the indenture, and upon his death, and a division of his estate to the defendant as one of his heirs, and while he owned it and after all the conveyances above mentioned, a brick dwelling-house was erected thereon, in which the party wall built by the owner of the plaintiffs' lot was used; and the plaintiffs after demand sued him upon the covenant for half of the value of the wall. Upon these facts, it will be observed, that by the indenture the entire fee in the defendant's lot had vested in his ancestor, leaving no reversion in the other parties to the indenture, under whom the plaintiffs claimed; that the plaintiffs did not themselves build the party wall in question; that the defendant did not acquire his title until after the walls had been built, and did not use the wall until after the plaintiffs had acquired their title; that the only privity of estate between the parties consisted in the mutual right and obligation created by the same instrument which contained the covenant sued on, to have the division wall stand half on each lot, and to contribute to the expense thereof; and that the obligation sought to be enforced against the defendant was an affirmative covenant to pay money. The court gave judgment for the plaintiffs, saying: "The liability to perform, and the right to take advantage of this covenant, both pass to the heir or assignee of the land to which the covenant is attached. This covenant can by no means be considered as merely personal, collateral and detached from the land. There was a privity of estate between the covenanting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns; it has direct and immediate reference to the land; it relates to the mode of occupying and enjoying the land; it is beneficial to the owner as owner, and to no other person; it is in truth inherent in and attached to the land, and necessarily goes with the land into the hands of the heir or assignee." The decision was thus put upon the ground of a privity of estate between the owners of the two lots, created by the indenture itself, and sufficient to support the covenant to pay for half of

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the wall as strictly a covenant running with the land; and not upon the theory (since applied in *Maine v. Cumston*, 98 Mass. 317, to the case of a similar agreement not under seal) that the person erecting the wall, and his assigns, had by virtue of the indenture a property in the whole wall until it was used by the owner of the adjoining lot in building thereon, and the right then to recover from him a proportion of the cost of the wall. The covenant to maintain a fence in the case at bar falls within the reason of the decision in *Savage v. Mason*.

The same doctrine was long ago recognized in *Holmes v. Buckley*, reported in Pre. Ch. 89, and 1 Eq. Cas. Ab. 27, and cited as undoubted law upon this point by Lord St. LEONARDS in Sugden on Vendors (14th ed.), 593, in which a covenant, in a grant of a water-course, to clear it and keep it in repair, was held to be a covenant running with land of the grantor through which the water-course passed. See also *Van Rensselaer v. Read*, 26 N. Y. 558, 574-577; *Woodruff v. Trenton Water Power Co.*, 2 Stockt. 489; *Carr v. Lowry*, 27 Penn. St. 257.

In the general definitions of easements in the text books, it is indeed sometimes said that they consist either in suffering something to be done, or in abstaining from doing something, upon the servient tenement. 3 Kent's Com. (6th ed.) 419; Washburn on Easements (2d ed.), 4, 5; Gale on Easements (4th ed.), 5. But the obligation to maintain a fence by prescription or agreement is classed by the same writers with easements, though Mr. Gale calls it a "spurious easement," and one of his editors "a right in the nature of an easement." 3 Kent's Com. 438; Washburn on Easements, 524; Gale on Easements, 117, 460, 487, 488, 524 note. See also Hunt on Boundaries and Fences (2d ed.), 49, 51, 99.

In England, it has been well settled from very early times, and never denied, that an obligation of the owner of land to fence against land adjoining may be established by prescription, and if so established is a charge upon his land. Had this not been so, the point, formerly much mooted, whether such a charge was extinguished by unity of possession and title of the two closes, could not have arisen. Fitz. N. B. 128 note. *Anon.*, Dyer, 295, b: *Surry v. Piggot*, Pop. 166, 170, 172; S. C., Noy, 84; Latch, 153. 154; *Bolus v. Hinstocks*, 1 Ventr. 97; S. C., 2 Keb. 686, 707; T. Raym. 192; *Star v. Rookesby*, 1 Salk. 835. Vin. Ab. Fences, pl 164, 166. *Boyle v. Tamlyn*, 9 D. & R. 430; S. C., 6 B. & C.

329; *Barber v. Whiteley*, 34 L. J. N. S. (Q. B.) 212. In *Boyle v. Tamlyn*, Mr. Justice BAYLEY said: "Such a right to have fences repaired by the owner of adjoining lands is in the nature of a grant of a distinct easement, affecting the land of the grantor." 9 D. & R. 437, and 6 B. & C. 338, 339. And Justices LITLEDALE and HOLROYD appear to have concurred in his view. 9 D. & R. 439, 440.

In Massachusetts, the doctrine has always been recognized, that the owner or occupier of land may be bound by prescription to a more extensive obligation to keep up and repair the division fences than would be imposed upon him by the common law or by the statutes of the Commonwealth. *Rust v. Low*, 6 Mass. 90, 94, 97; 2 Dane Ab. 659, 660; *Minor v. Deland*, 18 Pick. 266, 267; *Thayer v. Arnold*, 4 Met. 589, 590. In *Binney v. Hull*, 5 Pick. 503, 506, it was adjudged that the owner of one of two adjoining lots of land might be bound by prescription to maintain the fence between them; and Chief Justice PARKER spoke of the right to have him do so, as an easement in his land.

In the court of appeals of New York, Chief Justice DENIO assumed, as settled beyond question, that there might be a valid prescription by which the owner of land might become bound to maintain perpetually the whole of the division fence between his and the adjoining land; and said that he did not entertain any doubt "but that, when such prescription is established, it fastens itself upon the land charged with the burden and in favor of the tenements benefited by it. *Adams v. Van Alstyne*, 25 N. Y. 232, 235. And in two cases in inferior courts in that State covenants to erect and keep in repair division fences have been deemed covenants running with the land and binding the assigns of the covenantor. *Blain v. Taylor*, 19 Abbott Prac. 228; *Duffy v. New York & Harlem Railroad Co.*, 2 Hilton, 496.

In *Easter v. Little Miami Railroad Co.*, 14 Ohio State, 48, after a careful review of the leading cases in this Commonwealth and elsewhere, a positive opinion was expressed that, in a deed to a railroad corporation of a right of way over land of the grantor on which its track had been laid out, a covenant that the grantor, his heirs and assigns, would build and forever keep up a fence on each side thereof through the grantor's land, was a covenant running with that land; and it was held, that an assignee of that

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land was so far bound thereby that he could derive no advantage from its breach.

The only difference of opinion manifested in the cases cited at the bar, as to the operation of an agreement to build a fence, by way of charging the land with the obligation, has been where it expressed the undertaking of the grantee in a deed poll. If a grantee accepts such a deed, a promise binding himself and his representatives personally is doubtless implied. *Minor v. Deland*, 18 Pick. 266; *Newell v. Hill*, 2 Metc. 180. But in *Parish v. Whitney*, 3 Gray, 516, it was held that such a clause, even if purporting to bind the grantee's heirs and assigns, was not a covenant in any sense, and did not create an incumbrance upon the land. If that decision can be supported, it must be as falling within the rules that no easement in or right affecting real estate can be created by contract of the party, except by deed, and that an agreement not sealed by the party who is to perform it cannot create a covenant or run with the land. *Dyer v. Sanford*, 9 Metc. 395; *Goddard v. Dakin*, 10 id. 94; *Morse v. Copeland*, 2 Gray, 302; *Maine v. Cumston*, 98 Mass. 317, 320; *Wright v. Wright*, 21 Conn. 329, 342; *Standen v. Christmas*, 10 Q. B. 135; *Bickford v. Parson*, 5 C. B. 920. On the other hand, it has been held in Vermont and New Hampshire, that such a promise by the grantee in a deed poll, for the benefit of the adjoining land of the grantor, who retained no other interest in the land granted, was equivalent to a covenant running with the land, and created an incumbrance thereon. *Kellogg v. Robinson*, 6 Vt. 276; *Burbank v. Pillsbury*, 48 N. H. 475. But the present case does not require us to consider the effect of such a stipulation when not under the seal of the promisor; nor whether, as suggested in *Burbank v. Pillsbury*, an obligation not amounting to a covenant or other charge upon the land, but which might be enforced by a court of chancery in its discretion, is an incumbrance, the effect of which can be assessed in damages by a jury in a court of common law.

In the deed now before us, the covenant to maintain a fence upon the line of division between the land granted to the railroad corporation and the lands retained on either side thereof is made by the grantor, and is in terms declared to bind his heirs and assigns, and to be intended to be perpetual and obligatory upon him, and all persons who shall become owners of the lands on each side of the rail-

road, and this obligation is imposed upon all of them only as owners, and by virtue of their ownership. It would be difficult to express more clearly an intention that the duty of maintaining the fence should be a charge upon these lands, into whose hands soever they should come. The manifest purpose was to regulate the mode of occupying the lands retained, for the purpose of securing to the grantees the full beneficial use of the land granted, by establishing a permanent barrier to prevent all persons and cattle from straying upon it. The necessary conclusion is, upon principle and authority, that the terms of Coffin's deed conveyed to his grantees an interest in the nature of an easement in his adjoining lands, and thus created a sufficient privity of estate between them and his assigns, to support the covenant to maintain the fence as a covenant running with the lands adjoining; and that such easement and covenant constituted an incumbrance, which was a breach of a covenant against incumbrances in the subsequent deed to the plaintiff, upon which this action is brought. It was therefore rightly ruled at the trial, that the clause in Coffin's deed did not create a merely personal obligation, but constituted an incumbrance upon his adjoining lands.

Questions have sometimes arisen upon the effect of a covenant, the burden of which runs with the land, as against an assignee of part of the land charged with the burden. Where the assignees are tenants in common, they have been held jointly liable upon the covenant. *Morse v. Aldrich*, 1 Metc. 544; *Merceron v. Dowson*, 5 B. & C. 479; S. C., 8 D. & R. 264. Upon covenants to keep in repair, the assignee of part of the land has been held liable for not repairing his part. Shep. Touchst. 199; *Ards v. Watkin*, Cro. Eliz. 637, 651; *Congham v. King*, Cro. Car. 221; S. C., 1 Rol. Abr. 522; W. Jon. 245; *Bally v. Wells*, Wilm. 341, 346; S. C., 3 Wils. 25, 29; *Stevenson v. Lambard*, 2 East, 575, 580; Com. Dig. Covenant, C. 3. And in *Adams v. Van Alstyne*, 25 N. Y. 232, 235, Chief Justice DENIO was of opinion that every part of the premises charged with maintaining a fence was as much bound as the whole of the premises originally charged. But no such question is presented by the case at bar. The land conveyed by the defendants to the plaintiff included the line upon which the fence was to be maintained; and no point appears to have been made by the defendants at the trial, that, if the clause in Coffin's deed created any charge upon the plaintiff's land, it did not affect the whole of it.

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The obligation to maintain the fence, being a continuing charge upon the land, was not impaired by the omission to perform it for more than twenty years, without any evidence of its having been released or extinguished. *Arnold v. Stevens*, 24 Pick. 106; *Bannon v. Angier*, 2 Allen, 128.

The covenant upon which this action is brought is the covenant against incumbrances in the deed to the plaintiff, dated May 24, 1866; the breach of this covenant and cause of this action arose at that date, and could not be affected by the statute of limitations until twenty years afterward. *Clark v. Swift*, 3 Metc. 390.

The remaining questions presented by the report relate to the kind of fence which the obligation in Coffin's deed required to be maintained on the lands since conveyed by the defendants to the plaintiff, and to the measure of damages occasioned by the incumbrance thus created upon these lands.

The terms of the covenant "to maintain a sufficient fence through the whole length of that part of the railroad which runs through" these lands, which is declared to be perpetual and obligatory upon "all persons who shall become owners of the land on each side of said railroad," clearly imply that a fence is to be maintained on each side of the strip of land granted by Coffin to the railroad corporation; and that such fences are to stand wholly on the lands on either side, and not half on these lands and half on the land of the railroad corporation.

What would be a sufficient fence on either side of the railroad to satisfy the requirements of Coffin's deed would not necessarily be the same as the fence required by statute to be maintained between improved lands, to the satisfaction of fence-viewers. Rev. Sta., ch. 19, §§ 1 *et seq.*; Gen. Sta., ch. 25, §§ 1 *et seq.* The ruling upon this point was sufficiently favorable to the defendants. *Eames v. Salem & Lowell Railroad Co.*, 98 Mass. 560.

In order to test the accuracy of the instructions given to the jury, it will be convenient to consider the nature and extent of the various obligations, imposed by law or contract upon the owners of adjoining lands, to maintain fences.

By the law of this Commonwealth, as by the law of England, in the absence of any qualifying statute, agreement or prescription, the owners of adjoining lands were not obliged to maintain fences between them; although any one who did not do so would be responsible for the consequences of his omission, if his own beasts strayed

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and committed trespass, or if the beasts of others, rightfully upon the adjoining land, trespassed upon his premises. *Rust v. Low*, 6 Mass. 90; *Minor v. Deland*, 18 Pick. 266; *Thayer v. Arnold*, 4 Metc. 589; *Pool v. Alger*, 11 Gray, 489.

The statutes imposing upon railroad corporations the burden of maintaining fences by the side of their railroads, had not been passed when Coffin's deed was made, and do not apply to railroads constructed before their passage. Sta. 1841, ch. 125; 1846, ch. 271, § 3; Gen. Sta., ch. 63, § 43; *Stearns v. Old Colony & Fall River Railroad Co.*, 1 Allen, 493; *Baxter v. Boston & Worcester Railroad Co.*, 102 Mass. 383. Independently of such statutes and of any agreement, the taking of land by a railroad corporation for its road, like a similar taking by the public authorities for a highway, imposed upon the takers no obligation to fence, but left upon the landowner the burden of erecting and maintaining any fences required for the protection of his adjoining land, with the right to recover, as part of his damages, the reasonable expense thereof, if deemed by the jury to be a necessary, natural or probable consequence incident to the taking of his land for the public use. *Morse v. Boston & Maine Railroad*, 2 Cush. 536; *First Parish in North Bridgewater v. Plymouth*, 8 id. 475; *Holbrook v. McBride*, 4 Gray, 215, 220.

The obligation to make suitable fences, imposed by the covenant in Coffin's deed, was absolute, and did not depend upon the question whether such fences would otherwise have been necessary or expedient. *Lawton v. Fitchburg Railroad Co.*, 8 Cush. 230. Yet the refusal of the judge to instruct the jury, as requested by the defendants, "that the proper measure of damages is what the railroad corporation could recover in an action for a failure to perform the stipulation contained in the deed, regarded as an incumbrance," affords the defendants no ground of exception; for the real issue in the case was not what the railroad corporation could recover of their grantor, but how much the value of the lands charged with the obligation of maintaining the fence was affected by that obligation; and the instructions given directly met this issue, by instructing the jury that the rule of damages for breach of the covenant sued on was a just compensation for the real injury resulting from the incumbrance, and that they should inquire how far the existence of this incumbrance impaired the value of the estate to the owner, and what would be the difference in its fair market value by reason of the existence of this incumbrance. *Wetherbee v. Bennett*, 2 Allen, 428

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In estimating this difference in value, evidence of the cost of building and maintaining a sufficient fence was doubtless admissible, and it was introduced by both parties at the trial without objection. But as the judge correctly ruled, the cost of building and maintaining the fence was not to be treated as an additional item of damages. Nor was such cost to be taken into consideration at all, except so far as it exceeded the cost of maintaining any fences which would reasonably have been required to prevent the straying of persons or cattle upon or from those lands, if no express agreement had been made; for the burden of such fencing would have rested upon the owner of the lands, independently of the covenant. It follows that the instruction that the jury should include in the depreciation of the estate, if any, by reason of the incumbrance, the cost of building and maintaining the fence, was not sufficiently guarded, and would naturally tend unduly to enhance the damages; for the injury to the estate by the existence of the incumbrance could not exceed the extent of the obligation thereby imposed upon the owner, beyond what the situation and circumstances of the estate would otherwise have required him to do in the matter of fencing for its reasonable protection; whereas from the instruction given the jury might well infer that the whole cost of building and maintaining the fence must be included in estimating the diminution in the market value of the estate and the consequent injury to the plaintiff. Upon this ground only, the verdict must be set aside, and a

New trial ordered.

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(103 Mass. 219.)

Water-course — diversion of

In an action for the diversion of a water-course it appeared that, at a point on defendant's land, about five rods from plaintiff's land, the water ceased to flow between defined banks but spread out over the surface of the ground and so ran to and across plaintiff's land and then began to flow again in a defined channel. *Held*, that the stream did not cease to be a natural water-course, and that plaintiff could maintain the action.

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ACTION for the diversion by defendant of a water-course, thereby preventing the water from flowing through the plaintiff's lands. The trial judge reported as follows:

"The plaintiff's counsel, in his opening to the jury, stated that the evidence would show that from time immemorial a natural stream of water had flowed from a southerly direction across the road and upon the defendant's land, taking a north-westerly course across the defendant's land; that for a part of the way across the same it ran in a well-defined channel, but when it reached a point within about five rods of the plaintiff's adjoining land the water spread out over the surface of the ground, covering a space a few rods in width, and so ran upon and across the plaintiff's land, which was a level meadow, covering the same for several rods in width, and irrigating it in a valuable manner through its whole length, about seven rods, and thence on to other land of other owners beyond; that from the point where it so spread out over the surface on the defendant's land there was no defined channel either on the defendant's land or through the whole length of the plaintiff's land, and not until a short distance beyond the plaintiff's land, where it again formed a small brook, and ran off in a westerly direction to the river; that the plaintiff's and defendant's lands formerly belonged to the same ancestor, and the division was made after his death by quit-claim deeds; and that the defendant diverted this stream on his own land near to the road, where it was a water-course running in a defined channel, turning it in a northerly direction, so that it ceased to flow upon the plaintiff's land, thus injuring his land and crops.

"Upon this opening statement, the judge ruled that the plaintiff's action could not be maintained, and with the consent of parties, reports the case before verdict for consideration by the supreme judicial court. If the above ruling is correct, judgment is to be entered for the defendant; if it is incorrect, the case to be sent back for trial."

E. H. Bennett, for plaintiff.

C. I. Reed and *J. H. Dean*, for defendant.

CHAPMAN, C. J. The defendant admits the well-established principle, that, where there is a natural water-course, each succes-

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sive riparian proprietor has a right of property in it, and may maintain an action against one who diverts it from coming down to his land. But he contends that the facts stated in the report are not sufficient to establish the existence of such a water-course. This is the only point now presented to us.

We cannot doubt that water, which has flowed from time immemorial in a well-defined channel till it comes upon the defendant's land, and again after it has passed a short distance beyond the plaintiff's land forms a brook, and thus runs across the land of several proprietors to a river, into which it empties, is a natural water-course when it thus flows. But the defendant contends that because, at a point on his land about five rods above the plaintiff's land, the water spreads out over the surface, covering a space of a few rods in width, and thus runs upon and across the plaintiff's land, which is a level meadow, and covers the same for several rods in width, irrigating it in a valuable manner through its whole length, being about seven rods, and during this whole length of twelve rods has no defined channel, it ceases to be a water-course, and is to be regarded as mere surface water, to the flow of which the plaintiff has no right.

If the whole of the stream had sunk into the defendant's soil, and no water remained to pass to the plaintiff's land except under the surface, it would have ceased to be a water-course, and the plaintiff would have had no right to it. *Broadbent v. Ramsbotham*, 11 Exch. 602; *Buffum v. Harris*, 5 R. I. 243. Or if the water had only flowed in temporary outbursts, caused by melting snow or by rain, it would have been surface water, as in *Ashley v. Wolcott*, 11 Cush. 192; the defendant might have diverted it, and the plaintiffs might have raised barriers on their land to prevent its flowing upon their lot below. *Gannon v. Hardagon*, 10 Allen, 106; *Franklin v. Fisk*, 13 id. 211. But where, owing to the level character of the land, it spreads out over a wide space without any apparent banks, yet usually flows in a continuous current, and passes over the surface to the lands below, it still continues to be a water-course. *Gillett v. Johnson*, 30 Conn. 180. If the plaintiffs had erected a barrier to keep it from their land it would evidently have accumulated, by its natural and regular flow, upon the defendant's land, not merely when there were melting snows or rains, but at all ordinary seasons. We cannot doubt that not only the defendant, but all the lower proprietors, could have maintained an action against the plaintiffs for

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any damage caused by such obstruction, for it has a regular and natural flow from a permanent source, and its usual course is in a channel, with a well-defined bed and banks, and neither upon the land of the plaintiffs or of the defendant does it entirely lose this character.

Case to stand for trial.

WILSON V. CITY OF NEW BEDFORD.

(108 Mass. 261.)

Water-works — percolating waters.

Defendants built a reservoir on land sold to them by the plaintiff for that purpose. Water from the reservoir percolated through the soil and injured plaintiff's adjacent lands. *Held*, that defendants were liable for the damages.

PETITION under ch. 163, St. of 1863, which authorized the city of New Bedford to erect aqueducts, to acquire lands, etc., for the purpose of supplying the city with water, and which provided for the appointment, on petition, of three freeholders for the assessment of damages occasioned thereby when the parties could not agree.

The petitioner was the owner of a farm with a dwelling and barn thereon, and he represented that the city of New Bedford had constructed a large dam, reservoir and pond of water, near his said farm, for the purposes mentioned in said statute, thereby causing large quantities of water to flow into and through his said barn cellar and house cellar, and also making his farm land very wet, cold and heavy, greatly injuring the same and partially destroying his crops, thereby and in other ways causing him great loss and damage; and that he "has made repeated application to said city and the water commissioners appointed under said statute, for the payment of said damages, but they have not paid the same;" and therefore praying for the appointment by the court of three disinterested freeholders to assess his damages, and "that such proceedings may be had in the premises as the law in such cases requires."

The answer denied generally all the petitioner's allegations, and

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alleged "that the city purchased of the petitioner a certain lot of land, and took a deed thereof, for the purpose of erecting and building a reservoir and dam, and paid him all he asked therefor, and that, if the facts alleged in the petition are true, the defendants are not liable in this form and manner."

At the trial it appeared that the city in constructing water-works, in pursuance of the statute, had purchased of the petitioner the fee of the land covered by the reservoir, "for the purpose," as was set forth in the agreement of sale "of constructing, using and maintaining an aqueduct and reservoir and all other works necessary and convenient for the introduction of water into the city." That the city built a dam on said lands and thereby created a pond or reservoir of water, about a thousand feet distant from the petitioner's farm; that after the construction of the dam, water appeared in the petitioner's cellars and in the soil of the farm in a manner injurious to him, and which he contended was caused by said dam and reservoir, either by water percolating or by the reservoirs, preventing the natural passage of water underground into the natural stream on which the dam was constructed.

The judge reported these questions of law for the determination of this court before verdict.

E. H. Bennett (*H. J. Fuller* with him), for petitioner.

O. W. Clifford (*G. Marston* with him), for respondents:

1. The city is not liable under the statute, unless the damage would have been good ground for an action without the statute. *Caledonian Railway Co. v. Ogilvy*, 2 Macq. 229; *In the Matter of Penny*, 7 El. & Bl. 660; *New River Co. v. Johnson*, 2 El. & El. 435, 442; *Regina v. Metropolitan Board of Works*, 3 B. & S. 710, 727; *New Albany & Salem Railroad Co. v. Peterson*, 14 Ind. 112; *Fitchburg Railroad Co. v. Boston & Maine Railroad*, 3 Cush. 58, 88; *Davidson v. Same*, id. 91, 105; *Parker v. Same*, id. 107, 114; *Proprietors of Locks and Canals v. Nashua & Lowell Railroad Co.*, 10 Cush. 385, 388; *Mellen v. Western Railroad Co.*, 4 Gray, 301; *Dodge v. County Commissioners*, 3 Metc. 380, 382; *Boston & Worcester Railroad Co. v. Old Colony Railroad Co.*, 12 Cush. 605, 306; *Rood v. New York & Erie Railroad Co.*, 18 Barb. 80, 83, *Van Wyck v. Alliger*, 6 id. 507, 510.

2. The alleged damage is *damnum absque injuria* at common law.

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Acton v. Blundell, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. Cas. 349; *New River Co. v. Johnson*, 2 El. & El. 485; *Rogins v. Metropolitan Board of Works*, 3 B. & S. 710; *Smith v. Kenrick*, 7 C. B. 515; *Greenleaf v. Francis*, 18 Pick. 117; *Routh v. Driscoll*, 20 Conn. 533; *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Harwood v. Benton*, 32 id. 724; *Pixley v. Clark*, 32 Barb. 268, and 35 N. Y. 520.

3. The petitioner is estopped by his agreement and deed. *Gale on Easements*, 51, 52; *Goddard on Easements*, 85; *Washburn on Easements*, 34, and cases cited: *Pyer v. Carter*, 1 H. & N. 916; *Dodd v. Burchell*, 1 H. & C. 113; *Worthington v. Gimson*, 2 El. & El. 618; *Suffield v. Brown*, 33 L. J. N. S. (Ch.) 249; *Pearson v. Spencer*, 3 B. & S. 761; *Polden v. Bastard*, 7 id. 130; *Ewart v. Cochrane*, 4 Macq. 117; *Thayer v. Payne*, 2 Cush. 327; *Babcock v. Western Railroad Co.*, 9 Metc. 553; *Johnson v. Jordan*, 2 id. 234; *Adams v. Frothingham*, 3 Mass. 352; *Hathorn v. Stinson*, 10 Me. 224; *Wetmore v. White*, 2 Caines' Cas. 87; *Rood v. New York & Erie Railroad Co.*, 18 Barb. 80; *Hortsmann v. Covington & Lexington Railroad Co.*, 18 B. Monr. 218.

CHAPMAN, O. J. The act of 1863, ch. 163, for supplying the city of New Bedford with pure water, grants authority to the city to exercise the right of eminent domain by taking the land and streams therein named, erecting dams and laying water pipes. By § 6 the city is made liable to pay all damages that shall be sustained by any persons in their property by the taking of land, water or water rights, or by the construction of any dams, aqueducts, reservoirs or other works for the purposes of the act. This provision is in conformity with the tenth article of the declaration of rights, and both the grant of authority and the obligation to make compensation are to have a reasonable interpretation.

The city has taken the stream mentioned in the petition, and erected a dam across it, thereby creating a reservoir. The petitioner alleges that this reservoir had caused damage to him by reason of the percolation of water from the reservoir, underground, to his house cellar and barn cellar, about a thousand feet distant from the dam, and alongside of it, and preventing the natural passage of water underground into the natural stream on which the dam is constructed. The respondents contend that they are not liable to make a compensation for an injury of this character.

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It is true that the rights of neighboring proprietors of lands in underground waters which remain still, or naturally percolate through the soil without forming channels, are very different from their rights in water-courses. The percolating water belongs to the owner of the land, as much as the land itself, or the rocks and stones in it. Therefore, he may dig a well, and make it very large, and draw up the water by machinery, or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land; and his neighbor may, by a wall or other obstruction, retain the water which is upon his own land, and prevent the water from coming into his soil. This principle was discussed in *Greenleaf v. Francis*, 18 Pick. 117; and afterward in *Chasemore v. Richards*, 7 H. L. Cas. 349; and also in several other cases in England and this country. But the present case is of a different character. The respondents have so raised their dam and reservoir as to cause an artificial pressure of the water through the soil, and by its action it has flooded the petitioner's cellars. Probably it cannot be ascertained precisely how it acts underground.

In this Commonwealth, complaints under our mill acts have for many years presented cases quite similar to this. Lands are overflowed by mill ponds, and instead of an action at common law a process is provided by statute for the recovery of damages, quite similar to the process in this case. The question what kind of damages should be estimated has been discussed and settled in several cases. In *Monson & Brimfield Manufacturing Co. v. Fuller*, 15 Pick. 554, it was decided that damages occasioned by the percolation of water through the earth from the pond to neighboring uplands, and causing them to produce poorer grass or a smaller quantity of grass, could be recovered. In *Fuller v. Chicopee Manufacturing Co.*, 16 Gray, 46, it was decided that damages occasioned by raising the pond, so as to affect injuriously the water of the plaintiff's well, were recoverable; and no distinction was made as to whether it affected the well by overflowing or percolation. This principle is just; for the water often injures land which it never overflows; and where the soil is porous, the water may by percolation render a dwelling-house uninhabitable, or destroy the value of large tracts of land. Upon the same principle, it was held in *Ball v. Nye*, 99 Mass.

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582, that it was actionable to cause filthy water to percolate from the defendant's vault through his own soil and thence into his neighbor's soil, and thus injure his neighbor's well and cellar. In *Pixley v. Clark*, 35 N. Y. 520, the same principle was held in regard to water which percolates through the banks of a reservoir created by erecting a dam across a stream, and damages the plaintiff's land. *Rylands v. Fletcher*, Law Rep., 3 H. L. 330, affirming the decision of the exchequer chamber, states the same principle, in application to a reservoir created artificially, from which the water flowed through some passages apparently filled up, and long disused, into the plaintiff's mine. Lord CRANWORTH, in delivering his opinion, said: "If a person brings or accumulates on his land any thing which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." He distinguishes between natural percolation and that which is caused artificially. On this point he says: "If water naturally rising in the defendant's land had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint." "But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible."

The cases cited from Vermont are, to some extent, in apparent conflict with these authorities. They do not seem to distinguish, as these authorities do, between natural and artificial causes of injury.

We think the petitioner's claim is not only sustained by authority, but is founded on justice. He ought to be compensated for such an injury as the petition describes, and the law would be defective if it failed to give him a remedy.

The agreement which was made by the petitioner to sell to the respondent a tract of land on the stream, and the deed made by him in conformity thereto, are not to be construed as a release of damages for any injuries which the respondents might occasion to

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his other land. The agreement relates merely to the land to be conveyed, and the deed conveys merely the land and a way thereto. Neither of them purports to be a release of damages, and we think the same rule of construction is to be applied to them which was applied to the conveyance in *Lyman v. Boston & Worcester Railroad Co.* 4 Cush. 288.

Case to stand for trial.

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(100 Mass. 287.)

Sale.

A sale of fish hereafter to be caught passes no title to the fish when caught

ACTION of replevin by Alfred Low & Co. to recover a lot of flitched halibut from the assignee in bankruptcy of John Low & Co. The parties stated the following case: In April, 1869, as the schooner Florence Reed, owned by John Low & Co., was about to sail on a fishing voyage, the plaintiffs and said John Low & Co. entered into the following agreement, on which the plaintiffs paid \$1,500:

“We, John Low & Son, hereby sell, assign and set over unto Alfred Low & Company all the halibut that may be caught by the master and crew of the schooner Florence Reed, on the voyage upon which she is about to proceed from the port of Gloucester to the Grand Banks, at the rate of five cents and a quarter per pound for flitched halibut, to be delivered to said Alfred Low & Company as soon as said schooner arrives at said port of Gloucester at their wharf. And we, the said John Low & Son, hereby acknowledge the receipt of \$1,500 in part payment for the halibut that may be caught by the master and crew of said schooner on said voyage.”

In August following John Low & Co. were declared bankrupts and the defendants in this action were appointed assignees, and the deed of assignment executed to them.

On the return of the Florence Reed the United States marshal took possession of her and the cargo, under a warrant in the proceedings in bankruptcy, and transferred his possession to the defendants as such assignees.

The catch of the schooner consisted of 40,000 pounds of halibut; this the plaintiffs demanded, offering to pay the price stipulated in the agreement, less the \$1,500 paid. The defendants refused the demand. The plaintiffs replevied \$1,500 worth of the halibut and offered to receive the rest of the halibut and pay for it at the stipulated rate.

If on these facts the plaintiffs were entitled to recover, they were to have judgment for the nominal damages, but if otherwise, the defendants were to have judgment for a return, with damages equal to interest at the annual rate of six per cent on the appraised value of the fish replevied.

C. P. Thompson, for plaintiffs.

W. O. Endicott, for defendants.

MORTON, J. By the decree adjudging John Low & Son bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees. *Williams v. Merritt*, 103 Mass. 184, 4 Am. Rep. 521. The firm could not by a subsequent sale and delivery transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester, August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is, whether a sale of halibut afterward to be

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caught is valid, so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterward acquires them, is void. *Jones v. Richardson*, 10 Metc. 481. The same principle is applicable to all sales of personal property. *Rice v. Stone*, 1 Allen, 566, and cases cited; *Head v. Goodwin*, 37 Me. 181.

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest. 2 Kent's Com. (10th ed.) 468 (641), note a; *Jones v. Richardson*, 10 Metc. 481; *Bellows v. Wells*, 36 Vt. 599; *Van Hoozer v. Cory*, 34 Barb. 9; *Grantham v. Hawley*, Hob. 132.

The same principles have been applied by this court to the assignment of future wages or earnings. In *Mulhall v. Quinn*, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In *Hartley v. Tapley*, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or

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potential possession of, or interest in, the fish ; and that the sale to the plaintiffs was void.

The plaintiffs rely upon *Gardner v. Hoeg*, 18 Pick. 168, and *Tripp v. Brownell*, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was not any part of the oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar sometimes turns, did not arise and was not considered.

Judgment for the defendants.

INGALLS V. HERRICK.

(100 Mass. 351.)

Sale — delivery — possession by seller — when not fraudulent.

The plaintiff purchased, in good faith, bales of wool stored in the seller's factory, and the seller agreed to keep the wool for a time where it was on storage for the plaintiff, who had no place to store it. The seller, by the plaintiff's direction, opened some of the bales, took out of them samples, and delivered them to the plaintiff together with a bill of parcels wherein was acknowledged the receipt of the contract price. Plaintiff desired the parcels to resell the wool by. *Held*, that there was evidence to go to the jury of a delivery sufficient as to creditors.

ACTION against the sheriff of Essex for the conversion of twenty-one bales of fleeces of wool, attached by him as the property of one Lougee, in a suit against Lougee by one of his creditors.

The plaintiff's evidence tended to prove that December 16, 1866, he bargained with one Bosworth, a duly authorized agent of Lougee, for the purchase of the said wool at a certain price ; that he purchased the wool to sell again ; that the bales were numbered and marked and were at the time stored in Lougee's factory ; that plaintiff told Bosworth that he had no place of his own to store the wool in, and would like to have it remain for awhile where it was and he

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would pay storage on it; Bosworth agreed to this; that plaintiff requested Bosworth to furnish him with some samples of the wool to resell it by; that Bosworth opened some of the bales, took out the samples and sewed the bales up again; that he delivered these samples to plaintiff, together with a bill of parcels signed by Lorgee, specifying the numbers, marks and weights of the bales and acknowledging receipt of the agreed price.

The judge ruled that there was not sufficient evidence of delivery as against attaching creditors of the seller to go to the jury, and directed a verdict for the defendant. The plaintiff alleged exceptions.

J. K. Tarbox, for plaintiff.

S. B. Ives, Jr., and *S. Lincoln, Jr.*, for defendant.

COLT, J. It was ruled as matter of law, in this case, that the jury would not be authorized upon this evidence to find a delivery of the baled flocks, sufficient to pass a title valid as against creditors of the seller.

There was evidence tending to show that the bargain for the sale was made with one Bosworth, an agent of the seller. A receipted bill of parcels, signed by the seller himself, which contained a description of the bales by number, mark and weight, was afterward delivered by the agent to the plaintiff. The subject-matter of the sale was all the baled flocks then stored in the seller's factory. It was thus a completed contract of sale, and as between the parties the title passed to the plaintiff. Was there evidence to go to the jury of a delivery sufficient as to creditors? This is the only question, and in disposing of it we must take the sale to have been made in good faith and for a valuable consideration.

Upon this question, there was evidence tending to show that the flocks were bought for resale; that the bales were large, not easily moved, and requiring room for storage; that the plaintiff, having no convenient place, agreed with Bosworth, at the time of the bargain, to let them remain where they were, and pay storage, and directed him to obtain samples of the flocks, which he, the plaintiff, could take with him to New York to sell by; and that Bosworth accordingly opened the bales, took out samples of two kinds of flocks, sewed up the bales, and gave the samples to the plaintiff at the time he delivered the bill of parcels. The plaintiff bought upon

his own previous knowledge of the article, having seen the flocks at the store-room of the factory a week or two before. The samples were not required or used by him in reference to his own purchase, and Bosworth, in taking them from the bales, acted under the directions and as the agent of the plaintiff, and with reference to future sales by him. It was a significant act of ownership and possession on the part of the plaintiff, after the sale was agreed on, through Bosworth, acting in this respect as his agent. There is something more, therefore, here disclosed, than a mere contract of sale without delivery of possession under it. And we are of opinion, under the law heretofore laid down by the court, that the case should have been submitted, with proper instructions, to the jury.

It was early held that the possession of personal chattels by the vendor after an alleged sale is not conclusive evidence of fraud. Upon proof that the sale was made in good faith and for a valuable consideration, and that the possession after the sale was in pursuance of some agreement not inconsistent with honesty in the transaction, the vendee might hold against creditors. *Brooks v. Powers*, 15 Mass. 244. It was declared by MORTON, J., in *Shurtleff v. Willard*, 19 Pick. 202, 211, that, whatever the rule upon this point may be in England or elsewhere, it is perfectly well settled in a series of cases here, that the possession of the vendor is only evidence of fraud, which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the jury. It is certain that slight evidence of delivery is sufficient; and if the buyer with the consent of the seller obtains possession before any attachment or second sale, the transfer is complete without formal delivery. *Shumway v. Rutter*, 8 Pick. 443. A delivery of a portion in token of the whole is a sufficient constructive delivery as against creditors, although the goods are in the possession of various persons. *Legg v. Willard*, 17 Pick. 140. In *Hardy v. Potter*, 10 Gray, 89, the jury were told that, although the plaintiff only took a bill of sale, yet, if prior to the attachment he had been to the place where the lumber was, and had exercised acts of ownership over it, by virtue of his purchase, that would constitute a delivery of it good against a subsequent attachment. And this instruction was held not open to exception, although the evidence was that the purchaser had only been to Beverly and seen the lumber there. See, also, *Phelps v. Cutler*, 4 Gray, 137; *Tuxworth v*

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Moore, 9 Pick. 347; *Bullard v. Wait*, 16 Gray, 55; *Ropes v. Lane*, 9 Allen, 502, and 11 id. 591.

The fact that the possession of the property is retained by the vendor by agreement, and does not follow the bill of sale, is held by this court to be, in most of the cases, evidence of fraud, to go to the jury. In many of the States the fraud is held to be an inference of law resulting inevitably from the possession. And such was supposed to be the earlier English rule, as laid down in *Edwards v. Harben*, 2 T. R. 587. But the only point there decided was, that an absolute conveyance without possession, if there be nothing but that, is in point of law fraudulent. In the more recent cases, it has been declared that the continued possession by the vendor, of goods sold, is a fact to be considered by the jury, as evidence of fraud, and is not in law a fraud in itself. *Martindale v. Booth*, 3 B. & Ad. 498; Benjamin on Sales, 363.

There was evidence here of delivery which should have been submitted to the jury.

Exceptions sustained.

STODDARD V. PENNIMAN.

(103 Mass. 203.)

Promissory note — alteration of.

Defendant, for the maker's accommodation, indorsed a promissory note payable to the maker's order, and before the maker indorsed it. The maker, in negotiating the note to the plaintiff, altered its face so as to make it payable to the plaintiff's order, without the defendant's knowledge or consent. In an action to charge the defendant as an original promisor, *held*, that the alteration was material and avoided the defendant's liability.

ACTION to charge the defendant as maker of the following promissory note:

"\$400.

LAWRENCE, April 1, 1869.

"Two months after date I promise to pay to the order of myself Russell M. Stoddard four hundred dollars. Value received.

"JAMES W. HANSON."

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Indorsed with the successive signatures of John B. Penniman, the defendant, Charles A. Brown, and Russell S. Stoddard, the plaintiff.

The answer alleged, among other things, that the note had been materially altered since the defendant signed it, so as to be no longer binding on him. Trial in the superior court, before LORD, J., who made the following report thereof:

“It appeared in evidence that James W. Hanson, whose name appears on the face of the note as maker, brought it to the plaintiff for discount; that when he brought it, it was in the same form as it now appears, except that the word ‘myself’ had not been erased, nor the words ‘Russell M. Stoddard’ inserted; that the names of the defendant and Charles A. Brown were then on the back of it; that the plaintiff agreed to let Hanson have the money on it, but objected to the form of it, saying he had never heard of a note payable to the maker’s own order, and did not believe it was a proper form, but if Hanson would make it payable to his (Stoddard’s) order, he would give him the money; that Hanson thereupon erased the word ‘myself’ and wrote ‘Russell M. Stoddard’ in place of it; and that the plaintiff thereupon paid Hanson \$400. The plaintiff contended that the defendant assented to this alteration; but the defendant contended that he never knew or heard of it until about the maturity of the note. It was agreed that Hanson intended to write the name of the plaintiff, and wrote the wrong letter by mistake.

“The defendant offered evidence tending to prove that Hanson asked him to indorse a note for him for \$400, saying he could get Charles A. Brown to indorse it with him; that he consented to do so, provided Hanson could procure Brown to indorse first; and that Hanson thereupon brought him the note, payable to his own order, and he put his name upon it, with the distinct agreement that Hanson should procure Brown to indorse it above his name, and that it should not be used otherwise. It was understood at the time that the note was to be discounted at a bank.

“Brown testified that Hanson brought the note to him with Penniman’s name on it, and requested him to indorse it, and he, knowing Penniman to be responsible, wrote his name on the back, as second indorser; and that he never knew or suspected that the note was altered, until Hanson absconded, some time in May, before the maturity of the note.

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“The judge ruled that, if the defendant and Brown put their names on the back of the note, with the understanding that they were to be liable as indorsers only, then the alteration was material, and would avoid the note, unless the defendant assented to it and to a change by which he would become a joint and several maker. Before the conclusion of the trial he became in doubt as to the correctness of this ruling, and inclined to the opinion that Hanson, having received the note from Penniman and Brown before he had indorsed it himself, would have a right to make such an indorsement as would be precisely equivalent to the alteration as made, and thereby to make them joint and several promisors, and that the alteration was therefore immaterial; but he submitted the case to the jury upon his former ruling, and requested them to find specially whether the defendant and Brown undertook to be indorsers only. The jury found for the plaintiff, and also found specially on the question submitted to them, that ‘Penniman and Brown, in signing Hanson’s note, intended to put themselves in the position of indorsers only.’

“The defendant moved to set aside the verdict as against evidence; and the judge was of opinion that, upon his ruling, the verdict could not be supported, that the evidence was not sufficient to authorize the jury to find that the defendant assented to the alteration, and that the verdict ought to be set aside if the question of assent was material. But being now inclined to the opinion that the alteration was immaterial, and that therefore the plaintiff is entitled to a verdict as a matter of law he declined to set aside the verdict, and reports the case to the supreme judicial court. If the alteration was a material one, upon the facts heretofore recited and the special finding of the jury, then the verdict is to be set aside; if the ruling to the jury was erroneous, and they should have been instructed that the alteration was immaterial and did not avoid the note, so that the verdict can be supported without finding that the defendant and Brown assented to it, then judgment is to be entered upon the verdict.”

S. B. Ives, Jr., for defendant.

W. S. Knox, for plaintiff.

COLT, J. The defendant is sued as a joint and several promisor upon a note payable to the plaintiff. His name is upon the back of

the note only, but it was placed there before delivery to the payee, in blank; and upon the note, as it appeared at the trial, produced by the plaintiff, the defendant is chargeable as an original promisor, according to the rule that, when a person not a party to a note puts his name upon it before it is delivered as a valid contract, he thereby makes himself an original promisor. *Union Bank v. Willis*, 8 Metc. 504.

The defense here is, that there had been a material alteration in the note, made without the defendant's consent, and releasing him from all liability upon it. The note was originally drawn with the words "payable to the order of myself;" and while in that form the defendant put his name upon the back, solely for the accommodation of Hanson, the maker, who took it away with the express understanding between them that the defendant's liability was to be that of subsequent indorser. After it was presented by Hanson to the plaintiff for discount, the word "myself," at the plaintiff's suggestion, was erased by Hanson, and the plaintiff's name inserted in its place, and the money then paid upon it to Hanson.

We are of opinion that this was a material alteration in the form of the note. The undertaking of the defendant, as expressed in the original form, was that of an indorser after Hanson, the payee and maker. When the defendant put his name to the paper, it was incomplete as a contract, and could take effect as a note only when negotiated by Hanson's indorsement; but the words "payable to myself or order" import that Hanson was to be the first indorser. It is not unusual for a third person to indorse a note for the benefit of another before the payee puts his name upon it, leaving that to be done when it is negotiated by him. And in *Pierce v. Mann*, 17 Pick. 244, it was held that in such case a party making the indorsement is liable only as indorser. The obligation of the several parties is to be determined by the instrument as it appears when finished. The condition of the note when first delivered as a valid and binding contract is the test of liability. The order of time in which accommodation parties may have signed is immaterial, in the absence of any agreement varying the apparent liability. The defendant's signature on the back of a note payable to the maker's order indicated the extent to which he intended to become liable if the note should be negotiated. It was a limitation upon Hanson's authority in his use of the note, which he had no right to disregard. Under it, he could not legally make such alteration as would change

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a qualified liability as indorser, to pay whoever might acquire title to the note, into the absolute liability of an original promisor. And this limitation forbade him alike to change the name of the payee, or put his own name upon the back as last indorser, or make such special or restricted indorsement as would produce that result. *Patch v. Washburn*, 16 Gray, 82; *Brown v. Butler*, 99 Mass. 179; *Clapp v. Rice*, 13 Gray, 403.

The case at bar does not fall within *Union Bank v. Willis*, 8 Metc. 504, and the cases there cited. The rule there laid down has been declared anomalous, and is not to be extended in its application beyond the facts stated. It applies where, from the form of the note, there can be an original promise to pay a party named as payee. It does not apply where the note is payable to the maker's order, and where, from the nature of the transaction, there can be no joint and several promise to pay him, but only a promise to pay such person as the maker himself may by his own act make the bearer or indorsee. In the latter case, the more reasonable and natural interpretation of the contract of the parties is that which we here adopt. *Bigelow v. Colton*, 13 Gray, 309; *Ives v. Farmers' Bank*, 2 Allen, 286. See also *Ellis v. Brown*, 6 Barb. 282.

In accordance with the terms of the report, the entry must be:
Verdict set aside.

NATIONAL PEMBERTON BANK V. LOUGEE.

(103 Mass. 371.)

Promissory note — surety and joint promisor.

The defendants made a note in this form: "We, A and B, as principal, and C and D as surety, promise to pay to the order of ourselves," etc., signed on the face by A and B, and indorsed by all the parties. *Held*, that D's liability was that of surety and joint promisor in a note payable to the order of the principals and by them indorsed.

THIS was an action on a promissory note against William H. Lougee, Milton Bailey, Charles Ingalls, James Ingalls and James W. Bailey. Bailey alone defended. The note was as follows:

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“ \$4,000.	LAWRENCE, <i>Sept.</i> 17, 1868.	Indorsed,
Three months after date, for value received, we, Lougee & Bailey, as principal, and Charles Ingalls & Son and James W. Bailey as surety, promise to pay to the order of ourselves four thousand dollars.		“ William H. Lougee.
		“ Milton A. Bailey.
		“ Lougee & Bailey.
		“ Charles Ingalls.
		“ James Ingalls.
“ LOUGEE & BAILEY.”		“ James W. Bailey.”

The plaintiffs in the second count of their declaration alleged “that the defendants made a promissory note payable to their order, a copy whereof, with the indorsement thereon, is hereto annexed, and the plaintiffs are the holders of the note, and the defendants owe them the amount of said note and interest thereon.” And in their sixth count: “That the defendants William H. Lougee and Milton A. Bailey made a note payable to their own order, and indorsed the same to the plaintiffs; and the defendants Charles Ingalls and James Ingalls and James W. Bailey, in consideration that the plaintiffs would lend upon said note the sum of four thousand dollars, signed said note as surety, and promised to pay the plaintiffs the said sum of four thousand dollars; and the plaintiffs lent said sum to the defendants; and the defendants owe the plaintiffs the amount of said note and interest: a copy of which note is hereto annexed.”

Bailey demurred to the second count, as not setting forth any cause of action, in that it did not allege any indorsement, or other contract, by which the note became payable to the holders; and to the sixth, in that it joined in a single count parties alleged to be responsible in separate and distinct contracts. He also answered, denying generally all the plaintiffs’ allegations.

Trial in the superior court, before PUTNAM, J., who made the following report thereof: “The judge sustained the defendants’ demurrer to all the counts, except the second, of the amended declaration. At the trial on said second count, it appeared that the note declared on was in the form of the paper above set forth, and that the signature of James W. Bailey thereon was genuine. The judge ruled for the purposes of the trial, that, upon the proper construction of said paper, Bailey was liable on said count as a joint promisor, and that it was not competent for him to show by parol that the real contract was otherwise. A verdict was accordingly ordered for the plaintiffs for the amount of the note and interest, and the case is reported to the supreme judicial court for revision upon the correct-

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ness of all of said rulings. Judgment is to be rendered upon the verdict, or the same is to be set aside and such judgment entered upon each of said counts, or a new trial had, as the said court may determine."

S. B. Ives, Jr., and S. Lincoln, Jr., for James W. Bailey.

D. Saunders and C. G. Saunders, for plaintiffs.

COLT, J. The question whether James W. Bailey incurred any liability by putting his name upon this note, and if so, what that liability is, must be determined by the rules of law applicable to contracts of this description, and by the terms of the contract interpreted so as to give effect, if possible, to the intention of the parties.

It is argued by the defendant that he only assumed, by his signature on the back of the note, that form of liability which is declared in the body of it, namely, the liability of surety and joint promisor, and as the note is payable in words "to the order of ourselves," and has never been legally negotiated for want of his indorsement, the action must fail; and that the note is equally defective, if from the position of his signature he is to be regarded as an indorser only, because then the note is not signed by all the declared makers, and is an unexecuted contract, upon which no action can be maintained.

It is to be presumed that one who puts his name upon a note intends to add security and credit to it by his promise, and to become liable upon it in some form, either as maker, indorser or guarantor, either absolutely or conditionally. The time when, with references to its negotiation, the note is signed by the party sought to be charged, will often determine the nature of the liability. But in the absence of any thing to the contrary, it is presumed in favor of an honest holder for value, that all the names on a note, whether on the back or on the face, were placed there at the same time and before delivery. *Benthall v. Judkins*, 13 Metc. 265. If a person not the payee writes on the note at its inception, that he is to be holden as surety, he is liable as an original promisor. *Hunt v. Adams*, 5 Mass. 358. And this is true, if the signature is simply indorsed on the back of the instrument before delivery. *Union Bank v. Willis*, 8 Metc. 504, 509; *Clapp v. Rice*, 13 Gray, 403. These and other rules of interpretation have been adopted in order to

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give validity, in some form, to promissory notes and negotiable instruments, upon which parties have placed their signatures irregularly, with an intention which would otherwise be defeated — *ut res valeat quam pereat*.

If this paper, as now insisted, was not to have validity as a note without a repetition of the signatures of the parties named as sureties, then Bailey's act in placing his name upon it at all was nugatory and without purpose. But the presumption is that he intended to add to it the credit of his name; and we think that the instrument, rightly interpreted, carries out the intention. The note was made apparently for the accommodation of Lougee & Bailey. Ingalls & Son and James W. Bailey signed it only as sureties, and so declare in the body of it; but their names, instead of being written on the face of the note, are found on the back, underneath the indorsement of Lougee & Bailey, who as principals alone signed on the face of it. The significance which must be given to the fact, that the sureties thus place their names on the back, is, that the parties all understood and intended the words "pay to the order of ourselves" to refer only to the principals who alone signed beneath it; and regarded their indorsement as sufficient alone to transfer the note. James W. Bailey signed his name last of all. A repetition of his signature would not have enlarged or diminished his liability, and was doubtless deemed unnecessary. The defendant's liability is therefore that of surety and joint promisor in a note payable to the order of the principals and by them indorsed. Story on Notes, § 469.

There is no invasion here of the rule that one who puts his name on the back of a promissory note, before delivery, payable to the maker or order, and indorsed by the maker, is an indorser and not joint promisor. That would indeed be the relation, if the note was in the usual form. But this note is peculiar; and the application of the rule is controlled by the express declaration in the contract itself of the nature of the liability assumed. *Bigelow v. Colton*, 13 Gray, 309.

According to the terms of the report, judgment upon the verdict is to be rendered upon the last count in the amended declaration. The demurrer is overruled as to this count, and sustained as to all the rest.

Ordered accordingly.

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MADIGAN V. MCCARTHY.

(103 Mass. 378.)

Factures. Tenant at will.

A tenant at will removed a substantially constructed house from another place, on to the land of which he was a tenant, put it upon a stone foundation, with a cellar under it, without the land owner's consent, or any contract that the tenant should hold it as personal property. *Held*, that it became a part of the realty, and could not afterward become personal property by the mere assent of the land owner without an actual severance of it from the land.

MORTON, J. This is a suit in equity brought by the holder of a second mortgage of real estate, to redeem a prior mortgage. The case having been referred to a master in chancery, the proper mode of presenting to the court any question raised by his report would have been by specific exceptions taken by either party to the report. *Dean v. Emerson*, 102 Mass. 480. But as the defendants do not object to the irregularity of the mode in which the case is brought before us, and as both parties have argued the case upon its merits, we have considered the question raised by the report of the master. The question is, whether the house upon the mortgaged land is, as to the plaintiff, real or personal estate.

The master in his report states that he is "of the opinion that the building on said premises is personal property, never having become a part of the realty." We do not understand this as a finding of a contested fact upon unreported testimony, but as his ruling as to the legal results of the facts proved, which are stated in full in the report for the consideration of the court. We are therefore to test the correctness of the master's ruling by inquiring whether, upon all the facts reported, the house is to be regarded as part of the realty or as personal property.

The presumption is, that buildings belong to the owner of the land on which they stand, as a part of the realty. If one erects a permanent building, like a dwelling-house, upon the land of another voluntarily and without any contract with the owner, it becomes a part of the realty, and belongs to the owner of the soil. There is an exception to this general rule, where there is a contract, express or implied, with the owner, that the building shall not become a part

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of the realty, but shall remain personal property. *First Parish in Sudbury v. Jones*, 8 Cush. 184; *Howard v. Fessenden*, 14 Allen, 124. It has also been decided that, if a building has once been annexed to the realty, any subsequent contract of the owner, or any acts of his, such as giving a chattel mortgage, without a severance, will not, as against a purchaser of the land, disconnect it from the realty and give it the character of personal property. *Richardson v. Copeland*, 6 Gray, 536; *Gibbs v. Estey*, 15 id. 587; *Burk v. Hollis*, 98 Mass. 55; *Poor v. Oakman*, 104 id. 309.

Applying these principles to this case we are of opinion that upon the facts shown in the report the house in question cannot be regarded as personal estate. *Prima facie* it is a part of the realty, and belongs to the owner of the land on which it stands. The burden of proof is upon those who claim that it is personal property, to show that it retains that character. It appears by the report that the house was put upon the land in 1842 by Nathan Pearson, who was tenant at will under the heirs of Benjamin Pickman. It was a substantial structure, with a cellar under it and foundations of stone, and was intended to be, and has ever since been, occupied as a permanent dwelling-house. The report does not find that it was moved upon the land with the consent of the owners, or under any contract with them, express or implied, that it might remain the property of Pearson as a personal chattel. The only fact stated in the report bearing upon this point is, that "it is admitted that the Pickmans never would have claimed the building." This may be evidence of a previous consent that Pearson might put the house upon the land as a personal chattel, but it does not prove it. Of itself it is not sufficient, without the aid of other proof, to show such previous consent. It is equally consistent with the idea that the house was put upon the land without their consent, but that they, by a subsequent assent, were willing upon equitable considerations to allow Pearson the benefit of his expenditures. Upon the authorities above cited such subsequent assent could not give the house the character of personal property without a severance. In *Gibbs v. Estey*, it was held that where the owner of the land agreed, after the house was commenced and before it was completed, that the builder should hold it as personal property, the agreement was inoperative, and the house became annexed to the realty, as to a subsequent grantee of the land. We are of opinion that the facts of this case do not show that it is within the exception to the general rule as established by

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the decided cases; and we are not inclined to extend an exception the tendency of which is to confuse and unsettle titles to real estate.

The result of these considerations is, that the house in question became realty when it was put upon the land by Pearson, and that the subsequent mortgages and other conveyances of it as personal property were inoperative and void as against the purchaser of the land.

The respondent Ann McCarthy holds a mortgage of the realty dated May 16, 1859. The plaintiff holds a second mortgage dated April 7, 1860. According to the principles we have stated above, as to these mortgages, the house to be regarded as a part of the realty. The case must be recommitted to the master to state the accounts between the parties upon these principles.

Decree accordingly.

G. Wheatland, for plaintiff.

C. Sewell, for the holder of the prior mortgage.

COMMONWEALTH V. KANE.

(108 Mass. 423.)

Evidence — assaulting an officer.

On the trial of an indictment for an assault upon a police officer, evidence that he was at the time of the offense acting as such officer, and that he had publicly acted as such for four years previously, is sufficient to prove that he was a police officer.

INDICTMENT for assaulting a police officer. A verdict of guilty was returned in the superior court, and the following bill of exceptions was allowed:

“The only evidence offered by the Commonwealth to show that Philip R. Morse, the alleged officer, was a police officer at the time of the offense, and the only evidence in the case relating thereto, was the testimony of himself and other witnesses to the effect that he was at the time acting as such officer, and that he had publicly acted as such for the four years preceding. The city marshal of

Lynn testified that Morse had been acting as a 'police officer assigned for night duty.'

"The defendant objected that this was not competent or sufficient to authorize the jury to find that Morse was an officer. The judge refused so to rule, and instructed the jury that it was competent but not conclusive, and might be controlled by other evidence; that a man who had publicly acted in the capacity of an officer, as testified in this case, is presumed to have been duly appointed and qualified, unless the contrary appears.

"At the time of the assault, Morse was attempting to arrest the defendant without a warrant; and it was agreed that the resistance offered was justifiable, unless the attempted arrest was lawful."

C. Allen, attorney-general, for the Commonwealth.

S. B. Ives, Jr., for defendant.

GRAY, J. The foundation of the rule of evidence, that a person acting as a public officer has been duly appointed to the office which he assumes to exercise, is that all acts done by what appears to be public authority are presumed to be rightly done, until the contrary is proved. *Omnia presumuntur rite esse acta, donec probetur in contrarium. Bank of United States v. Dandridge*, 12 Wheat. 64, 70. And it is well settled that the rule applies to prosecution for injuries to a public officer in resisting him in the discharge of his duty.

In the leading case of *the Gordons* in 1789, all the judges of England were of opinion that, on the trial of an indictment for the murder of a constable in the execution of his office, while attempting to arrest the defendant, evidence that at the time he had his constable's staff with him and gave notice of his business, and that he was generally known as the constable of the parish, was sufficient. 1 Leach (4th ed.), 515; S. C., 1 East's P. C. 315; 4 T. R. 366, note. In a suit by the United States for a penalty for rescuing goods seized by a collector of customs, Chief Justice MARSHALL held that evidence that he had notoriously acted as collector was sufficient. *Jacob v. United States*, 1 Brock. 520. And in a criminal prosecution of the owner of cattle for an assault and battery in taking them from a person who had found them at large without a keeper, and was driving them along the highway, this

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court decided that his testimony that he was a field-driver of the town, and acted as such in taking the cattle and for many years before, was sufficient *prima facie* evidence of his authority. *Commonwealth v. McCue*, 16 Gray, 226. See also *Berryman v. Wise*, 4 T. R. 366; *Rea v. Verelst*, 3 Camp. 432; *United States v. Bachelor*, 2 Gallison, 15; *Sawyer v. Steele*, 3 Wash. C. C. 464; *People v. Hopson*, 1 Denio, 574.

The evidence offered at the trial was therefore competent and sufficient to prove that the person assaulted by the defendant was a public officer. The point taken at the argument, upon the authority of *Commonwealth v. Doherty*, 103 Mass. 443, that he might have been a police officer without authority to make arrests, does not appear to have been made at the trial, and cannot now be raised for the first time. *Commonwealth v. Stahl*, 7 Allen, 303; *Commonwealth v. Heffron*, 102 Mass. 148.

Exceptions overruled.

COMMONWEALTH V. TOBIN.

(103 Mass. 426.)

Evidence. Right of peace officer to enter house. Disturbance of the peace.

On the trial of an indictment for assaulting a police officer, evidence that the person assaulted was, at the time of the assault and with the defendant's knowledge, acting as a police officer, and wearing the uniform and badge of such officer, is sufficient proof that he was a police officer, to be submitted to the jury.

A constable has a right, by virtue of his office, and without a warrant, to enter any house, the door of which is unfastened, in which there is a noise amounting to a breach of the peace, and to arrest any person disturbing the peace there in his presence.

Any affray or assault is a disturbance of the peace.

The unlawful omission of an officer to make a subsequent complaint against a person, whom he has lawfully arrested without a warrant, is no defense to an indictment of the person for assaulting the officer in resisting the arrest.

INDICTMENT averring that the defendant, at Lynn, on March 19, 1871, "made an assault in and upon one William S. Waitt, he, the said Waitt, being then and there a police officer of said Lynn, and

then and there also being in the due and lawful discharge of the duties of said office, and him, the said Waitt, while then and there in the due and lawful execution of his said office, then and there unlawfully, knowingly and designedly did hinder, resist and oppose."

Trial and verdict of guilty in the superior court, before ROCKWELL, J., who allowed a bill of exceptions substantially as follows:

"The only evidence tending to prove that William S. Waitt, the alleged officer, was a police officer, was his testimony to the effect that, at the time of the alleged assault, he was acting in that capacity, and was dressed in the usual uniform of the Lynn police and wearing a police badge; and it was admitted that the defendant had knowledge of the facts in this respect.

"The evidence for the Commonwealth tended to prove that Waitt and Hiram Rowell, who was also acting as police officer, were in the streets of Lynn, about quarter before two o'clock in the morning of March 19, 1871, when they heard a loud noise, apparently of quarrelling, and traced it to the defendant's house; that they thereupon entered the house by opening an unlocked door, and found the defendant, and his wife and daughter, and another man there, and the defendant had his arm raised as if to strike his wife, who was some six feet from him; that Waitt at once seized the defendant, and, in reply to his question as to the cause of his arrest, told him that he was arrested for disturbing the peace; and that the defendant resisted the arrest, and used much violence in his resistance, which was the assault charged. The officers also testified that the defendant was intoxicated when they entered the house. All this testimony was controverted by the defendant, who contended that he was not intoxicated or noisy or quarrelling, and that no assault was made or attempted by him upon his wife.

"It appeared that the defendant was carried from the house to the police station at the time; but it did not appear that any complaint had ever been made against him for any offense.

"The defendant requested a ruling, that in a case like this, in which the official character of Waitt was important, not merely as aggravating the offense, but in which, save for such official character, his own act in arresting the defendant was a trespass and would justify the resistance proved, such character was to be strictly proved, and evidence that he was then acting and claiming to act as a police officer was not sufficient, and the defendant was entitled

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to a verdict. But the judge ruled otherwise ; and instructed the jury that this evidence was competent and sufficient to show the authority of Waitt to act as a police officer, if it was believed by them.

“ The defendant also requested a ruling that the failure to complain against and prosecute him for the offense, if any, for which he was arrested, made the officer a trespasser, and the defendant had the right to resist him ; and referred to the Stat. of 1869, ch. 415, § 42. But the judge instructed the jury that this was entirely immaterial, and that such failure to complain and prosecute could not avail the defendant.

“ The judge further instructed the jury as follows : ‘ If there was a noise, about two o’clock in the night, amounting to a breach of the peace, in the house (that is, such a noise as disturbed the neighborhood), the officer had a right to enter the house by opening an unfastened door ; and if, after so entering, the officer saw the defendant fighting with any other person, or assaulting any person, or engaged in attempting to strike any person there within his reach, so as to create a reasonable belief that he could strike unless prevented, he had a right to arrest and hold him, to prevent any further assault, by suitable and reasonable means ; and if the defendant assaulted the officer while thus engaged in arresting or holding him, he may be convicted ; but unless these facts are substantially proved, he must be acquitted.

“ After this instruction, the defendant requested the judge to instruct the jury further, that, if the officer undertook the arrest of the defendant because he had been disturbing the peace, and it did not appear that he had individually made any disturbance, then the arrest was unlawful and the defendant had the right to resist ; but the judge declined to modify or add to his instructions.”

C. Allen, attorney-general, for the Commonwealth.

S. B. Ives, Jr., for defendant.

GRAY, J. 1. The evidence that the person assaulted was, at the time of the assault, and with the defendant’s knowledge, acting as a police officer, and wearing the uniform of such an officer, was competent and sufficient evidence of his official capacity to be submitted to the jury. The want of similar proof as to any other time

might affect the weight, but not the competency, of this evidence. *Commonwealth v. Kane, ante*; *Sawyer v. Steele*, 3 Wash. C. C. 464; *Plumer v. Brisco*, 11 Q. B. 46; *Regina v. Vickery*, 13 id. 478; *Regina v. Murphy*, 8 Q. & P. 297, 310.

2. A constable has the right, by virtue of his office, and without any warrant, to enter any house, the door of which is unfastened, and in which there is a noise amounting to a breach of the peace, and to arrest any person engaged in the affray or in committing an assault in his presence, and hold him by suitable means for a reasonable time to prevent any further assault; and an assault by such a person upon the officer so arresting and holding him is an assault upon an officer in the discharge of his duty. *Commonwealth v. Hastings*, 9 Metc. 259. Any affray or assault is a disturbance of the peace, and might properly be so called by the officer in answering the defendant's inquiry as to the cause of his arrest. The final instruction given to the jury was therefore correct and sufficient.

3. The subsequent failure of the officer to make a complaint before a magistrate against his prisoner for the offense for which he had arrested him—whatever effect it might have to render the officer liable to an action of trespass by the latter—cannot affect the question whether his assault upon the officer was a breach of the criminal law. This question depended upon the facts and circumstances existing at the time when the assault was made. One ground of the doctrine of trespass *ab initio*, which, for reasons of public policy and the protection of the citizens against oppression, will not allow one, who abuses an authority given him by the law, to shelter himself under such authority when sued by the person injured by the abuse, is, that the citizen is bound to submit without resistance to its lawful exercise. *Esty v. Wilmot*, 15 Gray, 168, 169.

The doctrine of trespass *ab initio* has no application to criminal cases. The degree of a crime, once completed, cannot be aggravated by the subsequent act of the criminal, or lessened by that of a third person. In *State v. Moore*, 12 N. H. 42, it was held that a person who had lawfully entered a house could not be made a burglar by afterward stealing therein. The subsequent act or omission of the officer, not part of the same transaction, nor immediately connected in point of time with his arrest of his prisoner or the assault upon him by the latter, was not admissible in evidence against the Commonwealth in a prosecution for that assault. The offense of the defendant was complete as soon as he had assaulted the officer lawfully holding

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him, and might have been immediately made the subject of an indictment. The subsequent failure of an officer to do a distinct act, which the law required him to do in the further discharge of his duty, could no more affect the degree of the defendant's previous offense than it could the question of probable cause for such a prosecution. *Wilder v. Holden*, 24 Pick. 8; *Williams v. Babbitt*, 14 Gray, 141, 142. If the officer had no authority to discharge his prisoner from custody without bringing him before a magistrate, he certainly had no greater authority to release him from his responsibility to the Commonwealth for the offense already committed. It was therefore rightly ruled that the failure of the officer to complain against and prosecute the defendant for that offense could not avail him in this case.

It would seem, from the bill of exceptions, that the only cause for the arrest of the defendant, upon which the Commonwealth relied at the trial, or was allowed by the court to sustain the indictment, was a disturbance or breach of the peace. But if the defendant, at the time of assaulting the officer, was under arrest because he had been found in a state of intoxication committing a breach of the peace, the result must have been the same. By the Stat. of 1869, ch. 415, § 42, if any person "is found in any place in a state of intoxication committing a breach of the peace, or disturbing others by noise," any constable or police officer "shall without a warrant take him into custody, and detain him in some proper place until, in the opinion of such officer, he is so far recovered from his intoxication as to render it proper to carry him before a court of justice;" and "the officer shall then take him before some justice of the peace or police court in the city or town where he has been found, and shall make a complaint against him for the crime of drunkenness." If the defendant was arrested by the officer as directed by the first clause of this section, his assault upon the officer while thus lawfully under arrest was not rendered less criminal by the subsequent failure of the officer to comply with the second clause of the statute.

Exceptions overruled.

ATTORNEY-GENERAL V. WOODS.

(108 Mass. 438.)

Tide-water — navigable streams.

Information to restrain the defendant from rebuilding a dam across a river alleged to be within tide-water. The water, at the place, rose and fell two feet with the flow and ebb of the tide, the fluctuation being caused by the meeting of the sea water with the river water. The river was only navigated with pleasure boats. *Held* (1), that defendant's dam was within tide-water, and (2), that the river was navigable water.

INFORMATION in equity at the relation of the harbor commissioners to restrain the defendant from rebuilding a dam across the Mystic river, at a place alleged to be within tide-waters, and at which the river was navigable.

The defendant denied that the relators had any interest in or control over the subject-matter, and that for any wrong or injury that he might occasion to the Commonwealth by said dam, there was an adequate remedy at law.

The dam was built by defendant in 1851, and he continued to maintain and use it until 1870, when it was destroyed. This information was filed to restrain its rebuilding. The defendant owned the land on both sides of the river. The river flows into Boston harbor and has been used from time immemorial for pleasure boating from the harbor to Mystic pond, a short distance above the dam. The passage of such boats was seriously obstructed by the dam. At the dam the water rose and fell with the tide about two feet, caused by the meeting of the sea water with the river water, and the depth of the channel was about two feet at low water.

The trial judge reserved the case for the full court, who were to enter the proper decree therein.

D. E. Ware (*C. Allen*, attorney-general, with him), for the Commonwealth.

C. R. Train, for defendant.

CHAPMAN, C. J. The information is filed at the relation of the harbor commissioners of the Commonwealth to restrain the rebuild-

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ing of a dam across the Mystic river, a small stream flowing into Boston harbor. It has been used from time immemorial for pleasure boating between the harbor and Mystic pond, which is situated a short distance above the dam. Since 1851, pleasure boats have passed the dam daily during the summer, and their passage has been seriously obstructed by the dam.

It is denied by the defendant that the river at this place is within tide-water, because, it is said, although the rise and fall there is two feet, it is occasioned by the meeting of the salt water of the tide with the fresh water which comes down the stream. But the law on this point is well settled. It is the rise and fall of the water, and not the proportion of salt water to fresh, that determines whether a particular portion of a stream is within tide-water. This was settled in *The King v. Smith*, 2 Doug. 441, in application to the Thames at London; in *Peyroux v. Howard*, 7 Pet. 324, 338, in respect to the Mississippi at New Orleans; and in *Lapish v. Bangor Bank*, 8 Me. 85, in respect to the Penobscot at Bangor. The same doctrine must apply to small streams as to large ones. We have no doubt that the defendant's dam is within tide-water.

It is also denied that the stream is navigable, although it is about two feet deep at low water, because it is not proved to be used for the purposes of navigation except with pleasure boats. The case of *Rowe v. Granite Bridge Co.*, 21 Pick. 344, 347, is cited to sustain this position. Chief Justice SHAW there says: "It is not every small creek in which a fishing skiff or a gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character it must be navigable to some purpose useful to trade or agriculture." The same thing, in substance, is stated in *Charlestown v. County Commissioners*, 3 Metc. 202, and *Murdock v. Stickney*, 8 Cush. 113, 115. But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it this character. Navigable streams are highways, and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. Certainly fishing and fowling are as really regarded, on navigable waters, as trade and agriculture, though not mentioned in the case cited above; and in *West Roxbury v. Stoddard*, 7 Allen, 158, 171, it is said that the use of great ponds, which are public property, may as well be for bathing, boating, skating, fishing and fowling, as for business,

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and is entitled to equal consideration. If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation. The use that is actually made of Mystic river proves that it is navigable. The dam is within the public domain, for at the point where the tide, from natural causes, ebbs the lowest, is the boundary of the flats beyond which private titles do not reach. *Sparhawk v. Bullard*, 1 Metc. 95, 107. Beyond that point the legislature has control, for the common benefit of the public, and structures that interfere with the common right of navigation are a nuisance at common law. The legislature has a right to make reasonable restraints for the protection of the public, and enforce them by reasonable penalties. *Commonwealth v. Alger*, 7 Cush. 53, 92.

By the statutes of 1866, chap. 149, the legislature has made provision for these public interests. It creates a board of harbor commissioners, and confers on them the general care and supervision of all our harbors and tide-waters, and the flats and lands flowed by such tide-waters, except the Back Bay lands, respecting which other provisions are made. It designates particularly some of the duties of the commissioners. By section 5, all erections and works made without authority from the legislature, or in any manner not sanctioned by the commissioners, when their direction is required as provided in the statute, within tide-waters flowing into or through any harbor, shall be considered public nuisances, and liable to indictment as such. The prohibition extends to ordinary high-water mark. *Commonwealth v. Roxbury*, 9 Gray, 451; *Commonwealth v. Charlestown*, 1 Pick. 180. The defendant's dam is within this clause, there being no authority for its erection, derived either from the legislature or the commissioners.

This section further provides that the commissioners shall have power to order suits on behalf of the Commonwealth to prevent or stop, by injunction or otherwise, any such erection or other nuisance in the tide-waters which flow into or through any harbor in the Commonwealth. The attorney-general and district attorneys are directed to commence and conduct such suits.

It is contended that no remedy in equity exists, if there is a full, adequate and complete remedy at law; and that an injunction should not issue unless it appears that irreparable injury is to be

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prevented ; and authorities which are applicable to ordinary suits in equity are cited to sustain these positions. But the statute gives special remedies, and designates the cases to which this shall be applied. The remedy by injunction is cumulative.

The purpose of the statute is, not only to punish all encroachments upon this portion of the public domain, but to furnish means for their prevention or removal. It cannot be doubted that the legislature has power to do this, and to prohibit all invasions of the rights of the public without regard to the amount of damage occasioned by them. But in the present case the report finds that the obstruction to the navigation of the river by the defendant's dam is such as to create a nuisance of a serious character.

Injunction to issue.

COMMONWEALTH V. McAFEE.

(108 Mass. 452.)

Criminal law — indictment. Husband and wife — chastisement of wife.

An indictment for manslaughter, by striking the deceased upon her head and throwing her on the floor, is sustained by proof that defendant struck her on the head, and that she fell upon the floor and was killed by striking on a chair in her fall.

A man has no right to beat or strike his wife even if she is drunk or insolent, and if he do so, and she die from such beating, he will be guilty of manslaughter, at least.

INDICTMENT of Hugh McAfee, charging him with the manslaughter of Margaret McAfee, his wife, in that, he, " the said Margaret, did feloniously and willfully strike, kick, beat, bruise and wound, in and upon the head and body of her, the said Margaret, and her, the said Margaret, did throw upon the floor, thereby by the said striking, kicking, beating, wounding and throwing upon the floor, then and there giving to the said Margaret divers and many mortal strokes," etc., of which said mortal strokes, etc., the said Margaret then and there died.

It appeared at the trial that the defendant's wife was drunk ; that he struck her with his open hand, one blow on the cheek and one upon the temple ; and that she fell upon the floor and did not speak afterward. Medical witnesses testified, " that she had, by fall-

ing on a chair most probably, or by some other external force, been affected by concussion of the brain and effusion of blood on the brain, and that thus her death was occasioned."

The defendant requested the judge to instruct the jury "that the husband had a legal right to administer due and proper correction and corporal chastisement on his wife; that it was for the jury to say whether he had so done in this case, and whether his conduct was not lawful under this rule, upon the evidence; that the evidence would not sustain the indictment, as the latter did not allege a death by a striking of the defendant, which said striking caused a fall, which fall, under the circumstances, resulted fatally, by reason of her condition arising from intemperate habits; and that, even if the defendant had exceeded his lawful authority as husband, if the jury should find that the two blows were with the open hand, and were not such as the husband had any reason to believe, and did not believe, could produce any serious injury, he could not be convicted, although the death of his wife was hastened by the shock received in falling from the effects of the slap or slaps on her cheek by him."

The judge refused so to instruct the jury, and gave them the following instructions: "Upon any view of the facts in this case, which the testimony, taken most strongly for the defendant, will allow, there was, as matter of law, no justification for the blows given by the defendant to the deceased. If the unlawful blows of the defendant caused death, either directly, or by causing the deceased to fall upon the floor by the force and effect thereof, and so death thereby ensued, then the defendant is guilty of manslaughter." The jury returned a verdict of guilty, and the defendant alleged exceptions.

C. H. Hudson, for defendant.

C. Allen, attorney-general, for the Commonwealth, besides the cases cited in the opinion, referred, on the question of variance, to *Commonwealth v. Macloon*, 101 Mass. 1; *Regina v. Bird*, 5 Cox's Crim. Cas. 1, 20, 102; *Rex v. Mosley*, Mood. 97; *Rex v. Tye*, Russ. & Ry. 345; 2 Bishop's Crim. Proc., § 518; and on the question whether a husband could lawfully beat his wife, to *Poor v. Poor*, 5 N. H. 307, 313; *State v. Buckley*, 2 Harrington, 552; 1 Bishop's Crim. Law (5th ed.), § 891; 1 Bishop's Mar. & Div. (4th ed.), § 754

CHAPMAN, C. J. The motion to quash the indictment was not insisted on in the argument, and the indictment appears to be suffi

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cient. But it is contended that the cause of death is not truly stated, and that the evidence does not support the averment. The allegation is, that the defendant did strike, kick, beat, bruise and wound the deceased in and upon her head and body, and throw her upon the floor. The proof was, that he struck her with his open hand upon her cheek and about the temple, and she fell upon the floor and did not speak afterward. Medical witnesses attributed her death to falling on a chair most probably, or to some external force, and believed that concussion of the brain or effusion of blood on the brain had been produced.

The defendant's counsel cites *Kelly's case*, 1 Lewin, 193, where it was held that, when a blow with the fist was stated as the cause of death, and it appeared that in consequence of the blow the deceased fell upon a piece of brick and was killed by it, the cause of death was not truly stated; also *Thompson's case*, id. 194, where the allegation was of a killing by a beating on the head, and it appeared that in consequence of the beating the deceased fell upon the floor and was killed by it, and it was held that the cause of death was not truly stated. If in this case the beating only had been stated, those cases would be in point. But here the throwing upon the floor is also stated; and the intervention of a chair standing upon the floor, or of some other hard substance, would make no material variation. The case comes within the rule stated in *Commonwealth v. Woodward*, 102 Mass. 155; the killing is set forth with as much particularity as is necessary for the defendant in order to prepare his defense. The allegation is as nearly correspondent with the proof as in *The Queen v. McIntyre*, 2 Cox's Crim. Cas. 379; *Rex v. Waters*, 7 C. & P. 250; *Commonwealth v. Stafford*, 12 Cush. 619; *Commonwealth v. Fox*, 7 Gray, 585.

The beating of the defendant's wife was unlawful. In *Pearman v. Pearman*, 1 Swab. & Tristr. 601, it is said that there is no law authorizing a man to beat his drunken wife. Beating a wife is held to be unlawful in New York. *People v. Winters*, 2 Parker's Crim. Cas. 10; *Perry v. Perry*, 2 Paige, 501, 503. There is no authority in its favor in this Commonwealth. Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent. The blows being illegal, the defendant was at least guilty of manslaughter. *Commonwealth v. Fox*, 7 Gray, 585.

Exceptions overruled.

Way v. Howe.

WAY V. HOWE.

(108 Mass. 502.)

Bankruptcy — impeaching discharge in State court.

A certificate of discharge in bankruptcy, under the act of 1867, chapter 176, cannot be impeached in a State court, in an action upon a debt of a nature to be barred by a valid discharge, on account of the fraudulent conveyance of property by the bankrupt.

ACTION of contract on a note made by defendant. Answer, a discharge in bankruptcy granted to defendant after the making of the note by the district court of the United States. Reply, that the discharge was invalid because the defendant before, and in contemplation of the bankruptcy, transferred part of his property, with intent, of keeping it out of the hands of the assignee and from being distributed among the creditors.

The claim in suit, though provable, was not proved against the defendant's estate in the bankruptcy proceedings. The judge, at the trial, held that the plaintiff could not impeach the discharge in that court, and directed a verdict for the defendant. Plaintiff alleged exceptions.

G. S. Hillard, for plaintiff.

C. S. Lincoln, for defendant.

GRAY, J. This case presents the question whether a certificate of discharge, granted by the district court of the United States under the bankrupt act of 1867, ch. 176, can be impeached in a State court (in an action brought upon a debt which was provable against the estate in bankruptcy and which was of a nature to be barred by a valid discharge) on account of a fraudulent conveyance of property by the bankrupt.

It is not doubted that congress, under the power to establish a uniform system of bankruptcy, may prescribe the conditions upon which a certificate of discharge shall be granted, and the extent and degree of its effect; and that the question before us is therefore to be determined by the provisions of the statute. *Payson v. Payson*, 1 Mass. 283; *Burnside v. Brigham*, 8 Metc. 75. Those provisions, so far as they are material to the question at issue, are as follows:

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By the first section, the district courts of the United States are constituted courts of bankruptcy, with original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and authority to hear and adjudicate upon the same according to the provisions of the act.

By section 21, "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge; provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge;" and provided also that the suit may, by leave of the court in bankruptcy, proceed to judgment for the single purpose of ascertaining the amount due.

By section 29, the bankrupt, within the time therein limited, and not exceeding in any case a year from the adjudication of bankruptcy, "may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts," and by publication in the newspapers, "to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt;" and "no discharge shall be granted, or, if granted, shall be valid," if the bankrupt has made any fraudulent conveyance of his property, or done either of certain other acts therein enumerated.

By section 31, "any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion, order any question of fact so presented to be tried at a stated session of the district court."

Section 32 provides that, if it shall appear to the court "that the bankrupt has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided," and shall give him a certificate thereof in a form prescribed.

Section 33 provides that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act."

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Section 34 provides that "a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy; and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting the same forth *in hæc verba*, as a full and complete discharge of all suits brought on any such debts, claims, liabilities and demands; and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge; always provided, that any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained; may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section 29 it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance;" and if, after notice and hearing, the court shall find that any of the fraudulent acts alleged are proved, "and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled;" but if the court shall find that all the fraudulent acts alleged are not proved, "or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings."

The words "with the exceptions aforesaid" in section 34, like the words "except as hereinafter provided" in section 32, clearly refer to those debts which by the intermediate section are declared not to be barred by any discharge under the act.

With this reservation, section 34 explicitly declares that "a discharge duly granted under this act" (that is to say, by the court and in the manner already pointed out) "shall release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy," and "may be pleaded as a full and complete discharge to all suits brought thereon," as well as that "the certificate shall be conclusive evi-

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dence in favor of such bankrupt of the fact and regularity of such discharge."

The only restriction upon these sweeping and comprehensive words is to be found in the ensuing proviso in the same section, which allows any creditor, whose debt was either proved or provable against the estate in bankruptcy, to apply to the court of bankruptcy within two years afterward, and upon alleging and proving either of the causes mentioned in section 29, and also proving his own ignorance thereof, until after the granting of the discharge to obtain a judgment setting aside and annulling it. If he fail to prove either such fraudulent act of the bankrupt, or such ignorance on his own part, judgment is to be rendered in favor of the bankrupt, and the validity of the discharge is not affected.

The decisions under the insolvent laws of this Commonwealth, or the earlier bankrupt acts of the United States, are inapplicable to this case; because the former contained no provision for entirely setting aside or annulling a discharge once granted, and therefore its invalidity for any of the causes specified in them could only be alleged and proved whenever the discharge was pleaded in any action on a debt; and in the latter the right to impeach the discharge in any such action was expressly reserved. Stat. 1838, ch. 163, § 10; Gen. Stats., ch. 118, §§ 87, 88; U. S. Stats. 1800, ch. 19, § 34; 1841, ch. 9, § 4.

The intention of congress, in the bankrupt act of 1867, in omitting any such reservation in sections 29 and 34, and in giving a new proceeding by which any creditor, whose debt was proved or provable, may, upon proving a fraudulent act of the bankrupt, have the discharge set aside and annulled, if that act was unknown to him before the discharge was granted, but not otherwise, appears to us to have been, that the question of the discharge of the bankrupt from all debts and claims whatever (except of those classes which are declared not to be affected by any certificate of discharge) should be finally and conclusively settled by the court of bankruptcy within a moderate time, leaving the bankrupt, if he prevails on such trial of that issue, free from future suit, molestation or embarrassment on account thereof; and that every creditor should be obliged to try the question of the validity of the discharge, if at all, while the facts upon which it depends are comparatively recent, and in such a manner as to inure to the benefit of all the creditors if the discharge is annulled, and should not be allowed to wait until the

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period prescribed by the general statutes of limitation has nearly expired, and the bankrupt has perhaps established himself anew in business and suffered the means of disproving the charges against him to pass beyond his reach, and then bring a suit to which the other creditors are not parties, and thus harass him on account of his old debts, and obtain an inequitable advantage over them. It follows, that the remedy given by application to a district court of the United States under section 34 of the bankrupt act is exclusive of any other mode of impeaching the validity of a discharge, either in the Federal or in the State courts, on account of a fraudulent conveyance by the bankrupt in violation of the bankrupt act. *Simms v. Slacum*, 3 Cranch, 300, 308; *Crocker v. Marine National Bank*, 101 Mass. 240; 3 Am. Rep. 336, and authorities cited.

This conclusion is supported by an able judgment of the supreme court of Maine in *Corey v. Ripley*, 57 Me. 69; 2 Am. Rep. 19, and by a decision of the court of appeals of New York in *Ocean National Bank v. Olcott*, 46 N. Y. 12. See also *Linn v. Hamilton*, 5 Vroom, 305. The opposing decision in *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74, appears to have been made without a thorough examination of the provisions of the act of congress.

We are therefore of opinion that it was rightly ruled by the superior court that the defendant's discharge in bankruptcy could not be impeached or invalidated in this action for the causes stated in the replication.

Exceptions overruled.

BROCK V. STIMSON.

(108 Mass. 520.)

False imprisonment — arrest without warrant — failure to take offender before magistrate.

Plaintiff being drunk and disorderly in a public place, defendant, a police officer, arrested him without a warrant, as directed by a statute for such case provided, and which also directed that the offender be taken before a magistrate. Defendant kept plaintiff in custody for an hour and discharged him without taking him before a magistrate. *Held*, that the defendant was liable for assault and false imprisonment.

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ACTION in tort for assault and battery and false imprisonment. Defendant answered: "That he was the chief of police within and for the said city of Cambridge; that the plaintiff was in a certain horse car, within said city, drunk and intoxicated and disorderly, and disturbing the peace by his unlawful conduct; that the defendant, in the exercise of his duty as a police officer, directed the arrest of the plaintiff, and his removal from said car, and assisted thereat, and detained the plaintiff in custody at a station-house in said city for a short space of time and until he had recovered from the intoxication aforesaid, when the defendant released and discharged the plaintiff; and that, in all his acts aforesaid, the defendant did no more than he might lawfully do, and no more than his duty as such police officer."

At the trial in the superior court, before SCUDDER, J., the jury returned a verdict for the plaintiff, with damages in the sum of \$300; and the judge allowed a bill of exceptions which referred to the pleadings and continued as follows: "It was in evidence that the plaintiff was arrested without a warrant, and that the defendant, after detaining him in custody for the space of one hour, released him therefrom, and took no further proceeding in the premises. Upon this evidence, the judge instructed the jury that, even although they should find that the said arrest and imprisonment of the plaintiff were lawful and justifiable, yet it was the duty of the defendant to pursue the matter so far as to bring the plaintiff before a magistrate on complaint, for trial for the offense for which the said arrest was made, and that the failure of the defendant so to proceed made him a trespasser *ab initio*, unless the jury should be satisfied that the plaintiff consented to his discharge and the termination of the proceeding as aforesaid; to which ruling the defendant excepted."

J. W. Reed, for defendant.

N. St. J. Green and *J. L. Thorndike*, for plaintiff.

GRAY, J Every man has the right to the enjoyment of his liberty and the use of his property, except so far as restrained by law; and whoever unlawfully interferes with the enjoyment of the one, or the use of the other, is a trespasser. A man who seizes the property or arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a

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strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, he may not perhaps in the strictest sense be said to become a trespasser *ab initio*; but he is often called such, for his whole justification fails, and he stands as if he had never had any authority to take the property, and therefore appears to have been a trespasser from the beginning. 2 Rol. Ab. 563; *Shorland v. Govett*, 5 B. & C. 485; S. C., 8 D. & R. 257; *Smith v. Gates*, 21 Pick. 55; *Coffin v. Vincent*, 12 Cush. 98; *Russell v. Hanscomb*, 15 Gray, 166; *Munroe v. Merrill*, 6 id. 236; *Williams v. Babbitt*, 14 id. 141. The same rule holds good in the case of an officer who, after arresting a person on criminal process, omits to perform the duty required by the law, of taking him before a court. *Tubbs v. Tukey*, 3 Cush. 438.

The only justification set up in the answer is, that the defendant, being chief of police of the city of Cambridge, found the defendant in a public place in a state of intoxication, disorderly and disturbing the peace, and took him and detained him at a police station for a short space of time and until he had recovered from his intoxication, and then discharged him. But the statute of 1869, chap. 415, section 42, which directs an officer to take such a person without a warrant, and detain him in some proper place until he has so far recovered as to render it proper to take him before a court of justice, further expressly enacts that "the officer shall then take him before some justice of the peace or police court in the city or town where he has been found, and shall make a complaint against him for the crime of drunkenness." The statute authorizes the arrest without a warrant, only as a preliminary step toward taking the prisoner before a court. The defendant, as the bill of exceptions and his own answer both show, having failed to do this, cannot justify the arrest, and his unauthorized discharge of the prisoner affords him no protection from liability in this action.

Exceptions overruled.

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(108 Mass. 590.)

Divorce — power of court to vacate decree of, on ground of fraud.

A man obtained a divorce from his wife, at a former term of the court, by false testimony, on a libel of which she had no actual notice, knowledge of which he fraudulently kept from her and of which the court had only apparent jurisdiction founded on his false allegation of domicile. *Held*, that the court had power to vacate the decree of divorce.

PETITION by Jane A. Edson, of the city and State of New York, alleging that at the November term of this court, held in New Bedford, in the county of Bristol, upon the libel of William Edson, her husband, a divorce from the bonds of matrimony on the ground of adultery, was decreed against her, and the custody of her three children was granted to him; that in said libel her said husband alleged that he resided in said county of Bristol and that her residence was unknown to him; that notice to her of the filing of said libel was ordered published in a certain newspaper published in said county, and that no other notice was given to her and no appearance was made by her; that the allegations of adultery by her were false, and were and are known to be so by her said husband; that he did not, at the time of the filing of said libel or at any other time, live in said county, and that her residence was well known to him; that he was married to her at Philadelphia on May 14, 1856, and they removed to Brookline, in the county of Norfolk, in this Commonwealth, about October 1, 1865, and there lived together as husband and wife until February 4, 1866, when for good and lawful cause she left him, and has ever since lived in the family of her sister in New York; that at sundry times, while they were so living at Brookline, he committed adultery with divers lewd women, and especially with Susan P. McComb; that ever since June, 1866, and up to the time of the granting of said decree, he lived in open adultery with said McComb, at Brookline, in the house where the petitioner last resided with him; that he and McComb were so living as part of the family of Hiram E. Barstow and Louisa A. Barstow, wife of said Hiram; that McComb was there known and called as "Mrs. Edson," and as the reputed wife of her said paramour; and that they two

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and said Barstows continued so to reside at Brookline until about November 17, 1866, when they all absconded from the Commonwealth to parts unknown; that said decree was granted solely on the testimony of the Barstows, to the effect that the petitioner had admitted to them that she was guilty of adultery as alleged in the libel; that this testimony was false, and all the facts above alleged were well known to the Barstows; that the petitioner's said husband, before filing his libel, well knew that she was about to file a libel of divorce against him, to be made returnable at the term of this court next to be held in Norfolk, in which county alone jurisdiction thereof could be had, that she had retained counsel therefor, that he could obtain no divorce from her if she should appear and oppose any application made by him for a divorce, and that she would appear and oppose any such application of which she should have notice; that she believed that he filed his libel in Bristol, and falsely alleged his residence to be in that county and that her residence was to him unknown, and procured the order of notice by publication, solely with the design of preventing her appearance to oppose the libel, and of procuring the decree without notice to her; and that she had in fact no notice or suspicion of the pendency of the libel, or of any of his said proceedings therein, until November 25, 1866, when she learned casually, by a newspaper published in Boston, that the decree had been made several days before; wherefore the petitioner alleged "that said order of notice from this court, and the hearing upon said libel, and the said decree thereon, were obtained by a fraud practiced upon this petitioner and upon this court, and without knowledge of the petitioner, and against right," and prayed "that said decree may be reopened, vacated and declared to be null and void, and for such other and further relief as justice may require." A copy of the record of the decree of divorce was annexed.

An order of notice to William D. Edson was issued upon this petition, returnable in Suffolk in January, 1867, at which time he appeared and moved to dismiss the petition for the reason "that the proceedings referred to therein, and the record thereof, are in every respect regular, and it is not competent for this court to open and declare null and void the decree therein referred to for the reasons therein set forth." The question "whether the court, upon proof of the facts alleged in the petition, can grant to the petitioner any, and if so, what relief, either sitting in this county, or upon a new

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order of notice returnable, or a new petition filed in any other county," was reserved by GRAY, J., for the determination of the full court, upon the petition, the motion to dismiss, and the record of the divorce, and was argued in March, 1867.

W. G. Russell, for petitioner. 1. The American courts are governed by the same principles as to opening and reversing decrees of divorce as in other causes. Bishop on Mar. & Div. (4th ed.), § 751, and cases cited. A court of chancery will on motion vacate an enrolled decree, where the defendant has been deprived of his defense by surprise, mistake, accident or the neglect of his solicitor. *Thompon v. Goulding*, 5 Allen, 81, 82; *Parker v. Dee*, 3 Swanst. 529; *Robson v. Cranwell*, 1 Dickens, 61; *Kemp v. Squire*, 1 Ves. Sen. 205; *Stevens v. Guppy*, Turn. & Russ. 178; *Millspaugh v. McBride*, 7 Paige, 509; *Beekman v. Peck*, 3 Johns. Ch. 415; *Erwin v. Vint*, 6 Munf. 267. At common law also, a judgment of a former term may be vacated on motion. *Stickney v. Davis*, 17 Pick. 169. It is obvious that a fraud which prevents a defendant from making his defense is a stronger ground for setting aside a decree than mere surprise or mistake. *Loyd v. Mansell*, 2 P. W. 73; *Richmond v. Tayleur*, 1 id. 734, 736.

2. It has often been held, both in England and here, that fraud practiced in procuring a decree of divorce will avoid it. Shelford on Mar. & Div. 475; *Prudham v. Phillips*, Ambl. 763; S. C., 20 Howell State Trials, 479, note; *Roach v. Garvan*, 1 Ves. Sen. 157; *Conway v. Beazleg*, 3 Hagg. Eccl. 639, 643; *Allen v. Maclellan*, 12 Penn. S. 328; *Dunn v. Dunn*, 4 Paige, 425; *Singer v. Singer*, 41 Barb. 139; *Jeans v. Jeans*, 3 Harr. 136; *Johnson v. Johnson*, Walker's Ch. 309; *Mansfield v. Mansfield*, 26 Mo. 163; *Smith v. Smith*, 20 id. 166; *Wren v. Moss*, 2 Gilm. 72; *Carley v. Carley*, 7 Gray, 545. Such decisions are confirmed by numerous authorities establishing the invalidity of divorces obtained in another State in fraud of the law of domicile, or by imposition on the court. 2 Kent's Com. (11th ed.) 109; *Hanover v. Turner*, 14 Mass. 227; *Lyon v. Lyon*, 2 Gray, 367; *Harding v. Alden*, 9 Greenl. 140, 151; *Jackson v. Jackson*, 1 Johns. 424; *Borden v. Fitch*, 15 id. 121, 145; *Vischer v. Vischer*, 12 Barb. 640. These cases establish that this decree of divorce would have no validity in any other State; and it is not possible that the tribunal on which the fraud was practiced is the only one which is bound by it.

3. The decree, being null by reason of the fraud on the petitioner and the court, should be so pronounced, upon the facts appearing to the court on motion or petition. Bishop on Mar. & Div. (4th ed.), § 753, and cases cited; *Allen v. Maclellan*, 12 Penn. St. 328; 4 Am. Law Reg. 1, 48, note; *Carley v. Carley*, 7 Gray, 545.

The decisions in *Greene v. Greene*, 2 Gray, 361, and *Lucas v. Lucas*, 3 id. 136, do not preclude this remedy; but, fairly considered, rather favor it. The attempt in *Greene v. Greene* was to set aside, by another libel for divorce, a decree rendered in a case fully heard after notice and upon defense made. It was not a case of fraudulent judgment, but only of an allegation that false testimony had been offered to the court, the question of the truth or falsity of which was *res adjudicata*. Applying to the general statement contained in the last part of the opinion the qualifications stated in the earlier part of it, the case is by no means decisive of the present. But if that general statement is to be taken without qualification, it is submitted that the grounds of the decision are a fit subject for reconsideration. In considering the consequences of allowing the reversal of the decree of divorce, due weight was hardly allowed to the consequences of an absolute rule refusing such a reversal. The possible invalidating of a subsequent marriage, contracted on the faith of the judgment, may be no worse than the certain condemnation of an innocent wife to the disgrace of an irreversable decree of guilt, and to the loss of her children; and if no possible fraud is to be allowed to vitiate a decree, it may even occur that by a fictitious suit parties may find themselves upon the record divorced without the knowledge or consent of either. It may well be questioned also, whether any consequences to individuals can be so great an evil as that the highest judicial tribunal should be obliged to confess itself helpless in the hands of skillful fraud. It is also submitted that there was a misapprehension of the authorities cited in the opinion. That the force of the decision in *Allen v. Maclellan*, 12 Penn. St. 328, was misapprehended, see 4 Am. Law Reg. 48, note. The citation made from WILLES, C. J., in the leading case of *Prudham v. Phillips*, is incomplete in a vital point, and the case, as reported in Ambl. 763, and Howell's State Trials, 479, note, distinctly intimates that a defendant who cannot "plead that a judgment against him was fraudulent," may, nevertheless, apply to the court which rendered it, to vacate it on the ground of fraud. The case is simply authority for the proposition that a decree unreversed

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cannot be collaterally impeached by one of the parties to it; the decision in *Greene v. Greene* is to the same effect; and to that extent its doctrine is not to be questioned. But neither case should be considered authority for the broad doctrine that a decree obtained by fraud of one party cannot be directly impeached by the other. *Lucas v. Lucas* merely decides that, under the limited terms of our statute, review does not lie to vacate a decree of divorce.

For such a wrong as has been done to this petitioner, without fault or neglect on her part, under the form of judicial process, and for such a fraud upon this tribunal, it may well be assumed that some remedy exists. And if the court has determined that such a judgment cannot be impeached in an original bill or by review, it does not necessarily follow that the party is to suffer hopelessly, or the court is to submit to be made the instrument of fraud. The statute confers ample powers on the court in all cases where the course of procedure is not specially prescribed; Gen. Stats., ch. 107, § 53; and even in the absence of statutory provision, it has been held that like power would exist. *Le Barron v. Le Barron*, 35 Vt. 365.

B. W. Harris and *P. E. Tucker*, for respondent. An original proceeding cannot be maintained to set aside a decree of divorce from the bond of matrimony, on the ground that it was fraudulently obtained upon false evidence: *Greene v. Greene*, 2 Gray, 461; unless at the same term: *Carley v. Carley*, 7 id. 545. Nor can a writ of review: *Lucas v. Lucas*, 3 id. 136; *Sheafe v. Sheafe*, 9 Foster, 269; *Bascom v. Bascom*, 7 Ohio, 465; *Olin v. Hungerford*, 10 id. 268; nor a writ of error, for facts contradicting the record and showing want of jurisdiction: *Riley v. Waugh*, 8 Cush. 220. If the court will admit evidence outside of the record to show want of jurisdiction, when the record itself shows jurisdiction, no judgment or decree can be final.

BIGELOW, C. J. To a correct understanding of the points involved in the present case, it is to be borne in mind that the proceeding now before us is a petition by a party to a case, against whom a judgment has been rendered at a former term of this court in another county, asking that said judgment may be set aside and annulled on the ground that it was obtained by fraud. It is, in other words, an application to the court by one party in a suit.

against the other party to the same suit, to vacate a judgment rendered therein, and not an attempt to avoid the effect of a judgment in a proceeding purely collateral. It is also to be observed, in considering the application, as it is now brought before us, that all the facts stated in the petition are to be taken as true, and that it is to be assumed that they can be fully maintained by proof, if the petitioner is allowed to adduce evidence in support of the allegations. These set forth a case in which it is clear that a party has procured a judgment of this court in his favor by the perpetration of a gross fraud, by means of which he induced this court to take cognizance of a case at a term of the court in a county in which it could not legally exercise jurisdiction over the parties, and to hear and determine it without giving to the adverse party any due or legal notice of the proceedings, or any opportunity to appear and be heard in the suit. The question to be determined is, whether a judgment so obtained can be re-examined and set aside by the party aggrieved by the fraud, or whether it is to be taken as forever binding and conclusive on the rights and obligations of the parties.

The statement of the question is of itself sufficient to make it apparent that, if there is no remedy by which judgments so procured to be rendered can be impeached and annulled, courts of justice may be made instruments by which the grossest frauds may be successfully accomplished, to the great wrong and injury of innocent persons. Such a conclusion cannot be supported, unless it is founded on adjudicated cases which this court is bound to regard as obligatory declarations of the law, or upon reasons of the most decisive and satisfactory nature.

Upon careful examination of the authorities we are entirely satisfied that they do not sustain the doctrine, that courts have no power to grant relief to parties to a suit, against whom a judgment has been obtained by fraud. It is no doubt true, that a decree or judgment which stands unreversed and in force cannot be called in question or impeached in collateral proceedings, by one of the parties to the original suit; it is a very different proposition to maintain that an innocent party cannot invoke the power of the court by which the original judgment or decree was rendered, to vacate and annul it on the ground that it was procured by a fraud practiced on the court to his gross injury. We believe it to be an established principle of jurisprudence, that courts of justice have power, on due proceedings had, to set aside or vacate their judg-

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ments and decrees, whenever it appears that an innocent party without notice has been aggrieved by a judgment or decree obtained against him without his knowledge, by the fraud of the other party. Nor is this principle limited in its operation to courts which proceed according to the course of the common law. It is equally applicable to courts exercising jurisdiction in equity, and to tribunals having cognizance of cases which are usually heard and determined in the ecclesiastical courts. In tribunals of the last-named description, whose decrees cannot be revised by writ of error or review, the proper form of proceeding is by petition to vacate the former decree as having been obtained by fraud upon the party and imposition upon the court. *Parker v. Dee*, 3 Swanst. 529; *Kemp v. Squire*, 1 Ves. Sen. 205; *Roach v. Garvan*, id. 157; *Stephens v. Guppy*, Turn. & Russ. 178; *Richmond v. Tayleur*, 1 P. W. 734, 736; *Loyd v. Mansell*, 2 id. 73; Shelf. on Mar. & Div. 475; *Conway v. Beazley*, 3 Hagg. Eccl. 639, 642; *Prudham v. Phillips*, Ambl. 763; S. C., 20 How. State Trials, 479, note; *Jackson v. Jackson*, 1 Johns. 424; *Dunn v. Dunn*, 4 Paige, 425; Story's Conf. Laws, § 547; 2 Kent's Com. (11th ed.) 109.

The case of *Greene v. Greene*, 2 Gray, 361, which is cited and relied upon by the respondent, is not in conflict with the general current of authorities. Some of the general expressions used by the court, when disconnected from the facts of the case then in adjudication, have been thought to give sanction to the doctrine that a decree of divorce, when once obtained, could not be impeached in any form or mode of proceeding, or set aside by one of the parties to the original suit, however fraudulent and collusive may have been the conduct of the other party in its procurement. But such a conclusion is not a fair and legitimate result of the language and reasoning of the court, when considered, as it ought to be, solely with reference to the actual case before the court for adjudication. The attempt there was, upon a new libel for divorce, to try over again a case which had before been adjudicated between the same parties after due notice and opportunity for a full hearing on the merits. Strictly speaking, the decision is an authority only for the proposition that a decree of divorce cannot be called in question or invalidated, on the ground of fraud in its procurement, in a separate and independent libel, subsequently brought between the same parties, when it appears that the first decree was entered after due notice to the adverse party, followed by an adjudication upon

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evidence offered in support of the allegations in the libel. To this extent, there can be no doubt that the decision is in harmony with sound principle and with adjudicated cases. But beyond this, which was the precise point adjudicated, the authority of the case cannot be properly extended.

It certainly is clearly distinguishable from the case now before us. This is not a new suit in the nature of an original proceeding to obtain a decree of divorce, in the course of which it is attempted to treat a former decree as null and void. But it is a petition, addressed to the sound judicial discretion of the court, asking that a decree rendered at a former term may be reopened and vacated on the ground that it was fraudulently obtained. It is in the nature of an application to correct the record and prevent wrong and injustice from the effect of the judgment as it now stands. In this respect, it only invokes the exercise of a power of the court, for which there are precedents in analogous cases. *Stickney v. Davis*, 17 Pick. 169 ; *Capen v. Stoughton*, 16 Gray, 364. Nor does the petitioner seek to set aside a decree rendered against her in a suit of which the court had full jurisdiction, of the pendency of which she had due notice, and in which an opportunity to be heard was afforded her; but she asks only that she may not be deprived of her rights by a judgment rendered against her in a proceeding of which she not only had no notice, but of which all knowledge was fraudulently kept from her, and of which the court had no actual jurisdiction, but only an apparent jurisdiction, founded on a false allegation of domicile.

It is hardly necessary to add, that reasons of public policy, or a regard to the consequences which might ensue to innocent parties from the exercise of a power to invalidate a decree of divorce after it had become *res adjudicata*, do not constitute sufficient reasons for a denial of the existence of the power. Considerations of such a nature may well induce courts of justice to exercise the power with great caution, and only where the rights of parties are clear and there has been no neglect or failure to insist upon them in due season. Further than this, they can have no weight.

Motion to dismiss overruled ; petitioner to enter the case in the county of Bristol.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

GRAHAM V. KING, appellant.

(50 Mo. 22.)

Notice in newspapers

When legal notices are directed to be published in a newspaper, a newspaper in the English language is meant, in the absence of express direction to the contrary.

THE respondents, Graham and wife, executed a deed of trust on a piece of land lying in St. Charles county to secure the payment of a debt, and one of the appellants (King) was made the trustee therein. The deed contained the usual and ordinary provisions, and after default was made in the payment of the debt, authorized the "said King as trustee to proceed to sell the property" after having given the requisite notice in some newspaper published in St. Charles county. Payment not being made when the note became due, King advertised the property for sale in the *St. Charles Democrat*, a German newspaper, but the notice was inserted in the English language. There were two English papers published in St. Charles county, one, the *Cosmos*, having an equal circulation with the *Democrat*. At the sale, King, the trustee, was not present, but left the matter in the hands of his son, a minor. It is alleged

that the property sold for greatly below its value, and an injunction was asked to restrain the trustee from making a deed to the purchaser at the sale. After hearing the proof the court below decreed a perpetual injunction.

A. E. Lewis and Wm. A. Alexander, for appellants.

Orrick & Emmons, for respondents.

WAGNER, J. 1. The notice published in the German paper was obviously bad. When notices are to be published in a paper, an English paper is always intended unless it is expressed to be otherwise. The insertion of an English advertisement in a German paper would generally give less publicity to it than if it were published in the German language, as those among whom the paper circulates would not be able to read it in the English tongue. And if it were published in German, then it would be a sealed book to most of those who read and speak English. The trustee acted without authority in this matter and the notice was palpably insufficient. [The remainder of the opinion is not important.]

Judgment affirmed.

STATE *ex rel.* SEELIGMAN V. HAYS.

(50 Mo. 24.)

State bonds — power of legislature over manner of payment.

The bonds of the State were expressed on their face to be payable in gold and silver coin. The legislature passed a resolution to pay them in legal tender notes. *Held*, that the court had no power to compel the State officers to make payment in coin.

THIS was a petition for a mandamus against the defendants as fund commissioners.

Sharp & Broadhead, for relator.

A. J. Baker, attorney-general. for respondents.

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BLISS, J. The relator is the owner and holder of one of the Pacific Railroad State bonds issued under the act to expedite the construction of the Pacific Railroad and the Hannibal & St. Joseph Railroad, approved February 22, 1851, and payable upon its face "in gold or silver at the Phoenix Bank in the city of New York," and has sued out of this court an alternative writ of *mandamus*, directed to defendants as fund commissioners setting forth its issue under the act, its presentation at maturity at said Phoenix Bank, and demand of payment in gold or silver, which was refused, and the creation of the sinking fund and its appropriation in the hands of defendants for the redemption of the bonds of the State, covering the one presented. The return admits all the allegations of the writ, but sets up as a reason for not paying in gold and silver the following joint resolution of the general assembly of February 8, 1872:

"Concurrent resolution instructing the fund commissioners to pay the State bonds which became due in 1872, in legal-tender notes.

"WHEREAS, four hundred and twenty-two bonds of the State of Missouri, of \$1,000 each, issued during the year 1852, become redeemable the present year; and WHEREAS, the following words occur in each of such bonds, to wit, 'said State promises to pay in gold or silver coin;' and WHEREAS, an act approved February 22, 1851, entitled 'An act to expedite the construction of the Pacific Railroad and the Hannibal & St. Joseph Railroad,' under which said bonds were issued, is printed on the back of each of said bonds, does not specify that the words 'gold or silver coin' shall be inserted in said bonds; and WHEREAS, section 7 of said act sets forth the following language: 'and is redeemable at the pleasure of the legislature at any time after the expiration of twenty years from the date thereof;' therefore, be it

"Resolved, by the senate, the house of representatives concurring therein, that the fund commissioners are hereby directed to instruct the financial agent of the State, the National Bank of Commerce in New York city, to redeem the bonds as they become respectively redeemable in the year 1872, in legal-tender notes."

No question is raised as to the previous appropriation to redeem the bonds. In passing the above resolution the legislature has taken it for granted, and only directs the manner in which they should be paid. That the bonds are payable in gold and silver coin,

as they purport upon their face to be, I cannot entertain a doubt. The promise was to pay \$1,000 in gold and silver, which could only mean at the time gold and silver dollars, and the only question is whether the legal-tender act absolves the obligor from the obligation thereby assumed. I am not at liberty to consider the question as an open one. The Federal courts have jurisdiction in cases arising under Federal statutes, and the interpretation given them by the United States supreme court is obligatory upon other tribunals. Obligations of the kind under consideration have frequently been brought before that court, and it has uniformly held them to be payable in gold or silver dollars, and not in legal-tender currency. The first case in which the question was considered was *Bronson v. Rodes*, 7 Wall. 229, where the court held (Justice MILLER only dissenting) that a bond given in 1851, for the payment of a certain sum "in gold and silver coin, lawful money of the United States," could not be discharged by legal-tender notes amounting to such sum. This doctrine was affirmed in *Butler v. Howitz*, same volume, 258, and at the present term of the same court the question is again considered in *Tubilcock v. Wilson*. In the latter case a promissory note was given for \$700 "payable in specie," and the court held the term to be merely descriptive of the kind of dollars in which the note was payable, there being different kinds in circulation recognized by law.

Nor do I think the obligor can now properly say that the governor, as his agent, exceeded his authority upon these two questions. I am still satisfied with the opinions given to the governor by Judge ADAMS and myself in January last, and think, as matters then stood, it was the duty of the fund commissioners to pay the bonds in gold or silver coin.

But the return shows their present duty in altogether a different light. The law-making power of the State has interfered and given positive directions in the matter, and the commissioners, as servants and agents of the State, are imperatively bound by these directions. It is not enough to say that the State cannot impair the obligation of a contract, for there is no way of enforcing such as those under consideration. It is purely a matter of public faith. No suit can be instituted against the State, and no executive officer can redeem its obligations farther than furnished with money expressly appropriated for that purpose.

It is said that the appropriation was once made. True, but the

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same power may withdraw it, in whole or in part, or may prescribe conditions upon which it shall be used. The whole matter is under the control of the legislature, and it would be simply usurpation for the fund commissioners to act other than as directed by that body. We consider the joint resolution as a modification of the previous appropriation.

These are axioms of political law, and cannot be made plainer than by a simple statement; and the legislature, which particularly represents the State, having determined to pay in Federal paper the bonds due in 1872, we cannot interfere to require its servants to pay in any other manner, although of opinion that it has thereby failed to meet the State's obligations. The wrong, if wrong there be, must be remedied by the legislature itself.

The peremptory writ is refused.

GARRETZEN V. DUENCKEL, appellant.

(50 Mo. 104.)

Negligence — liability of master for negligence of servant.

Defendant was the keeper of a gun store. His servant, a clerk in the store, while engaged, during defendant's absence, in exhibiting a gun to a customer, loaded it, contrary to defendant's orders. In so doing it was accidentally discharged and shot the plaintiff, who was on the opposite side of the street. *Held*, that the defendant was liable for the injuries.

THIS was an action against the defendant for damages caused by a wound inflicted on the plaintiff by the firing of a gun by a salesman who was in the employ of the defendant. The record shows that at the time of the happening of the injury the defendant was the keeper of a gun and ammunition store; that one Brewer was his servant, employed by him in selling arms and ammunition; and that, upon the occasion of the injury, the defendant being absent, Brewer was showing a rifle of Henry's patent to a customer, who requested to have it loaded, in order that he might see how it worked, and refused to buy unless it was done. Brewer at first refused, stating that it was against his orders to load firearms

in the store, but for the purpose of making the sale he was finally persuaded and induced to load the gun, and in doing so it was discharged and shot the plaintiff, who was sitting at a window in a house on the opposite side of the street. The defense was that, inasmuch as the act of loading the gun was against the orders and instructions of the defendant, Brewer was acting outside of the scope of his employment, and the defendant was not bound. This defense was overruled, and the jury found a verdict for the plaintiff, and the case is brought here by appeal.

J. Wickham, for appellant. The defense set up is that the salesman was not acting in the course of his employment, and that the master is not liable for damages resulting from an injury caused by the carelessness or negligence of the servant in the performance of an act not within the scope of the agency or the course of the employment of the servant, and which was expressly forbidden; also that there was no negligence. The principle of law holding the master liable for the acts of his servant or agent, rests on the ground that the master should not do an act himself, or cause it to be done, with such negligence or want of skill as to injure third persons. This principle does not reach a wrong done by the servant while not engaged in the business of his master; nor does it reach wrongs caused by negligence in the performance of an act not directed by the master, or not within the scope of the agency or the course of the employment of the servant. 1 Am. Lead. Cas. 619.

A master is not liable for any act or omission of his servants which is not connected with the business in which they serve him, and does not happen in the course of their employment. Beyond the scope of his authority the servant is as much a stranger as any other person. Schouler's Dom. Rel. 638; Shearm. & Redf. Negl. 64, 71; id. 77, § 63; *Foster v. Essex Bank*, 17 Mass. 479; *Douglass v. Stephens*, 18 id. 366, 367. No servant can, by an unauthorized act of his, raise a presumption against the master; the master, in such case, is no more liable to such a presumption than a stranger. The law will not infer authority to commit a trespass; and in order to hold the master liable for a trespass committed by a servant, it is necessary to show that the act was done while the servant was acting under the authority of the master; and if wrong be done by a servant without the authority of his master, and not for the purpose of executing his orders and doing his business, the master is

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not liable. *Church v. Mansfield*, 20 Conn. 287; *Howe v. Newmark*, 12 Allen, 52; *Mali v. Lord*, 39 N. Y. 384. It was the duty of the plaintiff to show affirmatively that the act complained of was within the scope or course of the duty of the servant. *Wilson v. Peverly*, 2 N. H. 548; *Wright v. Wilcox*, 19 Wend. 343, 345; *Tuller v. Voght*, 13 Ill. 285; *McManus v. Crickett*, 1 East, 107.

The only authority presumed by law is to do all lawful acts belonging to his employment, and the specific instructions of the master determine the limits of the employment and scope of the duty of the servant; no man is chargeable with the acts of his servant but when they are done in the execution of the authority given him. When the servant oversteps his authority he becomes as a stranger, and the act not having been done in the service of the master, or within the limits of his authority, but contrary to his express and specific instructions, it was willful, and the master is not liable. *Oxford v. Peter*, 28 Ill. 435; *Harris v. Nicholas*, 5 Mumf. 489; *Wright v. Wilcox*, 19 Wend. 345; *Armstrong v. Cooley*, 5 Gill. 512; *Joel v. Morison*, 25 Eng. Com. Law, 512; *McKeon v. Citizens' Railway Co.*, 42 Mo. 87-8.

The cases of *Joel v. Morison*, 6 Carr. & P. 501, and *Sleath v. Wilson*, 9 id. 607, cited by respondent in support of the proposition that it is immaterial whether the act complained of was done in disregard of the orders of the master, have been overruled by late authorities. *Mitchell v. Crassweller*, 13 C. B. 237; 16 Eng. L. and Eq. 448, 451; *Storey v. Ashton*, L. R., 4 Q. B. 476, 479; *Bard v. Yohn*, 26 Penn. St. 482.

Jecko & Hospes, for respondent.

WAGNER, J. The universally recognized rule is that a principal is civilly liable for the neglect, fraud, or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act; but the liability is only for acts committed in the course of the agent's employment. A master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders, and for their negligence in selecting means by which the orders are to be carried out. In determining whether a particular act is done in the course of a servant's employment, it is proper first to inquire whether the servant

was at the time engaged in serving his master. If the act was done while the servant was at liberty from his service, and pursuing his own ends exclusively, there can then be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master. Shearm. & Redf. Negl., § 63 and notes. It may not, perhaps, be very easy to reconcile the numerous cases on this subject, but we think that the correct rule extracted and deduced from them will be found as above laid down.

The leading case cited and relied on for the appellant is *McManus v. Crickett*, 1 East, 106. But that decision rested entirely upon the distinction between trespass and trespass on the case under the old forms of pleading. That case only decided that trespass *vi et armis* would not lie against the master for the willful trespass of his servant, which was not authorized or consented to by the master either directly or by implication, from the nature or subject-matter of the employment.

Lord KENYON, in giving the judgment, says: "When a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord HOLT his master will not be answerable for such an act." But he adds, that "this doctrine does not at all militate with the case in which a master has been holden liable for the mischief arising from the negligence or unskillfulness of his servant, who had no purpose but the execution of his master's orders," but that the form of such action must be case and not trespass.

The opinion contains nothing which bears upon this intermediate case of a servant who does not "quit sight of the object for which he is employed," but for the purpose of executing his master's orders, and in the course of his employment does an act injurious to another, or in disregard of his rights.

A few cases may be cited as illustrative of the principle, to show the turning point of responsibility on the part of the master.

In the case of *McClenaghan v. Brock*, 5 Rich. Law, 17, plaintiff's slave was on board a steamboat as a passenger, and the second engineer of the boat, by negligently discharging a gun, wounded him while he was upon a lighter alongside of the steamboat, and it was held that the captain was not responsible. The engineer, it will be

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seen, was not acting, in the discharge of the gun, in any duty connected with his employment. He was doing something on his own account, independent of his business with the boat.

In the case of *Mali v. Lord*, 39 N. Y. 381, the plaintiff was in defendant's store purchasing goods, the defendant was absent at the time, and the superintendent and clerks suspecting the plaintiff of having stolen goods, called in a policeman and had her searched; no goods were found upon her. She then brought her action for damages, and the court decided that as the act was done without the knowledge or the express or implied authority of the proprietor or owner, the master was not liable; that the servant was not impliedly authorized by his master to do that which the master himself, being present, would not be authorized to do. The selling of goods, which was the only power conferred upon the servants, had nothing to do with the matter of making arrests for supposed offenses.

In *McKenzie v. McLeod*, 10 Bing. 385, the servant was employed to light fires in the house, and she lighted furze and straw with a view to clean a chimney that smoked, and in doing so the house caught fire and was burned up. The servant was cautioned against the danger of such a proceeding, and it was shown that it was no part of her duty, but, that carpenters and masons were employed to cleanse the chimney, and that they had recently performed that work in the presence of the servant. Under these circumstances it was left to the jury to say whether the servant was acting within the scope of her duty; and the jury having found for the defendant, the court refused to grant a new trial. This case is criticised by the authors of the treatise on negligence, and they declare that, although the principle may be sound, it may well be doubted whether the jury did not err in finding that the act was not within the scope of the servant's general or ostensible authority.

Douglass v. Stephens, 18 Mo. 362, was an action for damages to the goods of the plaintiff in the cellar of his store, alleged to have been caused by the obstructions of a sewer by the servants of the defendants; and Scott, J., in delivering the opinion of the court, said: "Although a master is not liable in trespass as principal for the unlawful and directly injurious act of his servant unless he has commanded it, yet he is responsible for consequential damages where, by the negligence and carelessness of the servant in doing the business of his employer, another receives an injury for which the servant would himself be liable in an action of trespass. To

make the master liable for the consequential damages resulting from the trespass of the servant, it must appear that the servant was in the course of his employment, and that by an injudicious or negligent or unskillful act done in furtherance of his master's business the injury resulted to the plaintiff. But if the servant, willfully and to effect some design of his own, does an injury to another, the master will not be liable."

To the same effect is the more recent case of *Minter v. Pacific R. R.*, 41 Mo. 503, where we held that if a servant is acting in the execution of his master's order, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master, or was even contrary to his master's order.

In *Croft v. Alison*, 4 B. & Ald. 590, the court of king's bench say that "the distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person and produces the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment." The case showed that the defendant's servant had willfully struck the plaintiff's horses when driving his master's carriage, in order to extricate himself from an entanglement of the carriages, occasioned by his own fault, and thereby had caused an injury to the plaintiff's carriage, and a verdict for the plaintiff was supported.

In *Seymour v. Greenwood*, 6 Hurlst. & Norm. 359, Chief Baron POLLOCK asks the question, "Suppose a servant, driving along a road, in order to avoid a danger, intentionally drove against the carriage of another, would not the master be responsible?" And in *Limpus v. London General Omnibus Company*, 1 Hurlst. & Colt. 526, it was decided in the exchequer chamber that the master is responsible if the servant is in the course of doing the master's work and does the act to accomplish it.

In a recent well-considered case in Massachusetts, after a review of the authorities, the court, speaking through HOAR, J., lays down the doctrine as follows: "In an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the

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purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the objects for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence or by wanton or reckless purpose to accomplish his master's business in an unlawful manner." *Howe v. Newmarch*, 12 Allen, 49.

This exposition of the law fully coincides with the previous rulings of this court. The true ground upon which a master avoids responsibility for most of the willful acts of his servants, when unauthorized by him, is that they are not done in the course of the servant's employment. When they are so done, the master is liable for them. Tested by those principles, the conclusion in this case is inevitable. Brewer, the servant, was unquestionably aiming to execute the order of his principal or master. He was acting within the scope of this authority and engaged in furtherance of his master's business. There is no pretense that he was endeavoring to do any thing for himself. He was acting in pursuance of authority, and trying to sell a gun, to make a bargain for his master, and in his eagerness to subserve his master's interests he acted injudiciously and negligently. It makes no difference that he disobeyed instructions. Innocent third parties who are injured in consequence of his acts cannot be affected thereby. The instructions of the court fairly submitted the question of negligence to the jury, and are not obnoxious to any reasonable objection. The court committed no error in ruling out the evidence offered by the defendant for the purpose of showing that the act of loading or charging guns in a store is no part of the business of selling the same. If we admit that the servant did an unauthorized act, the evident truth still remains that it was done wholly in carrying out and executing his master's business, and in such a case the master will be held liable. When the servant acts in the course of his employment, although outside of his instructions, the master will be held responsible for his acts.

I see no error in the record, and with the concurrence of the other judges the judgment will be affirmed.

Judgment affirmed.

Sheehan v. The Good Samaritan Hospital.

SHEEHAN V. THE GOOD SAMARITAN HOSPITAL, appellant.

(50 Mo. 155.)

Taxation — assessments for local improvements.

A charitable corporation, which is, by its charter, "exempted from taxation of every kind," is not exempted from special assessments against its property for improvements in a street on which it abuts. (See note, p. 418.)

ACTION to recover a special assessment for the improvement of a street fronting defendant's property.

Gardner, for appellant.

Grace, for respondent.

WAGNER, J. The defendant's charter provides that the square or block, or part of a "square or block or tract, not exceeding ten acres, in the county of St. Louis, on which the corporation hereby chartered shall have or erect its hospital building, shall, so long and so far as occupied by the hospital yard or yards, walk or walks, garden or gardens of such hospital, together with all the furniture, beds and other hospital apparatus, be exempted from taxation of every kind." Sess. Acts 1859, p. 326, § 5. The ground upon which the hospital is erected lies within the city of St. Louis, and does not exceed ten acres, and the city made a special assessment against it for the improvement of the street on its front, and the payment was resisted for the sole reason that the charter exempted the property from taxation. The Circuit Court ruled against the objection and gave judgment for the plaintiff on the tax bill founded on the assessment.

We think the judgment of the court below was clearly right. The taxation from which the defendant was exempted was for the ordinary taxes raised for the purposes of revenue. Taxes are charges or burdens imposed by the legislative power upon persons or property to raise money for public purposes, or to defray the necessary expenses in administering the government, and it was from taxes of this description that the legislature intended to exempt defendant's property. The tax bill here sued on is not regarded as a tax, but

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as an assessment for improvements, and is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement. This question is well settled both in this State and elsewhere. *Lockwood v. The City of St. Louis*, 24 Mo. 20; *In the matter of the Mayor of New York*, 11 Johns. 80; *Northern Liberties v. St. John's Church*, 13 Penn. St. 107; *Crowley v. Copley*, 2 La. Ann. 329.

Judgment affirmed. The other judges concur.

NOTE.—To to the same effect is *First Presbyterian Church v. City of Fort Wayne*, 10 Am. Rep. 25; and see note thereto.—REP.

NORVELL V. DEVAL, appellant.

(50 Mo. 272.)

Jury — sealed verdict — insanity of juror.

After a sealed verdict was returned, but before it was opened, one of the jury became insane. The court received the verdict in the presence of the rest of jury, and denied a request to have them polled. *Held*, error, and that a *venire de novo* should be granted.

THE facts are stated in the opinion.

R. P. Bland and *A. J. Seay*, for appellant.

Ewing & Smith, with *Pomeroy*, for respondent.

ADAMS, J. This was an action for assault and battery, commenced in Crawford county, and taken to Phelps county by change of venue because the judge had been of counsel in the case. The plaintiff was an infant when the suit was commenced, and a next friend was appointed for him without a regular petition. But during the pendency of the suit he became of age, and on motion was allowed to prosecute his suit as an adult, and, as such, filed an amended petition to which the defendant filed an answer, justifying the assault and battery on the ground of self-defense.

The case was submitted to a jury on the 9th of April, 1870, on which day the court made an order of record that if the jury did

not agree, the sheriff should keep them in custody, and on the 11th of April, 1870, convey them to Waynesville, Pulaski county. The court adjourned on the 9th of April till the 24th of May, 1870, and the jury found a sealed verdict which was signed by all the jurors, and retained till the court met, on the 24th of May. In the mean time one of the jurors became insane and had been sent to the lunatic asylum, and only eleven jurors appeared in court when the sealed verdict was opened and delivered to the court. The verdict was for five dollars damages in favor of plaintiff. The defendant asked that the jury might be polled, but the court refused permission to poll the jury because one of them was absent and insane, and the defendant excepted. The defendant filed motions for new trial and in arrest, which were overruled and final judgment rendered against him, from which he has appealed to this court.

The only material question in this case is as to the validity of the verdict. The court had no right to have the jury carried from one county to another. This has never been the practice in this State, and ought not to be allowed. The entry of the order for removal amounted to nothing, as it was not carried out.

It seems to me that a court has no authority to leave a jury in session after the adjournment of a term to a distant day. As long as a judge remains as the head of the court he may keep the jury in session. But when the court adjourns over, and he is no longer head of the court, how is a jury to be kept as a constituent part of the court when there is no court in session?

A court may be adjourned from day to day, or for several days, but if the jury is retained at all it is also adjourned over as part of the court. But even if the practice were right, only eleven jurors appeared when the court met on the 24th of May. A jury in a court of record must consist of twelve men. If, after a jury is sworn, one of them dies or is rendered incompetent by insanity or otherwise, no verdict can be rendered, and a new jury must be ordered. They must all be present in court when the verdict is rendered. This has always been the universal practice, and it would be dangerous to the rights of litigants to adopt any other rule. Either party has the right to poll the jury. It makes no difference whether the verdict is signed by all the jurors or only by the foreman. The parties have the right to know of each juror whether the verdict rendered is his, and this can only be done by polling the jury before they are discharged. The verdict is not perfect till it is delivered to the court

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by the jury in the presence of all of them. The verdict in this case ought not to have been received from the eleven jurors. The proper course would have been to discharge the jury on account of the insanity of one of them, and let the case be tried by another jury.

The judgment must be reversed and the cause remanded. The other judges concur.

STATE ex rel. HENDERSON v. COUNTY COURT OF BOONE COUNTY.

(50 Mo. 317.)

Constitutional law — special legislation — power of legislature.

Where the constitution provides that the legislature "shall pass no special law for any case for which provision can be made by a general law," the legislature is the sole judge as to whether provision by a general law is possible. (WAGNER, J., dissenting.)

THE legislature passed an act, which was approved April 1, 1872, establishing probate courts in eight counties, the county of Boone being one of the number. The act was to take effect and go into operation on the 1st day of June next after its passage, and at the ensuing November election, judges for the respective courts were to be elected. No provision was made for filling the office of judge prior to the time designated for the election. Under these circumstances the governor deemed that there was a vacancy, and proceeded to fill the same by appointment. A judge was duly appointed and qualified in the county of Boone, who demanded of the county court the books, papers, etc., belonging to the office of probate; but the county court refused to deliver the same, and continued to exercise probate jurisdiction, denying that the probate judge appointed by the governor was a legal officer; and this proceeding was instituted to test their right to hold and retain the before-mentioned jurisdiction. The other facts appear in the opinion.

P. E. Bland and A. J. Baker, for relator.

H. C. Pierce and W. Gordon, for defendant.

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ADAMS, J. 1. The first question presented by this record is the constitutionality of the act of the legislature establishing a probate court for Boone county. It is urged that the legislature is prohibited from passing such an act by the provisions of section 27 of article 4 of the constitution of this State. The section referred to, after enumerating many cases where the legislature is positively prohibited from passing a special law, contains this clause: "The general assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section and for all other cases where a general law can be made applicable." The new constitution containing this section took effect the 4th day of July, 1865. Since that time the legislature, by special acts, has created in various parts of the State many probate and common pleas courts. These courts have been in full operation for many years, and have transacted a great deal of business, and are still transacting business. Large investments have been made, and titles to property acquired and transferred, on the faith that these courts were legally established, and that their acts and proceedings were valid. If they have no legal existence, all their acts and proceedings are *coram non judice* and absolutely void. A tribunal for the transaction of judicial business can only be created by the supreme power of the State. No person on his own motion has the power to erect himself into a court. He may without any authority assume the office of judge of a court which has a legal existence, and preside as such, and all the acts of a court presided over by him will be valid. But where there is no law authorizing such court to be held, and the judge assumes to create a court and preside over it, the tribunal so created and all its proceedings are absolutely void. Can the office of judge of a court be assumed where there is no such office and no such court in existence? Such a proposition seems to me to be wholly untenable.

Can there be such a thing as a *de facto* court where there is a rightful government? If the government itself is a usurpation, as long as such government lasts the courts established by it are *de facto* courts, because the only existing government is *de facto*; and when the rightful government is restored, the acts of such courts, as a matter of necessity, must be held to be valid. That is not the case in a rightful government. The authority to establish the court must emanate from the supreme power, otherwise the court itself is

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an absolute nullity and all its proceedings utterly void. In the State of Maine a probate judge assumed to hold a court at a place where he was not authorized by law to hold this court, and even in such case the supreme court of that State held the acts of the court a nullity. See 27 Me. 114.

These observations belong to the cause, and are not made because I consider the act of the legislature irreconcilable with the constitution, but to indicate the deep magnitude of the people, as well as to individuals, of the question presented by this record. In Illinois, the supreme court of the State refrained from looking into the constitutionality of certain acts of a local character on account of the long-continued practice of the legislature and the far-spread ruin it would produce to declare them void. See *Johnson v. Joliet & Chicago R. R. Co.*, 23 Ill. 202. We are not without authority in support of the constitutionality of this law. So far as legislative action can give sanction to such a law, it has received it from the uniform practice of the legislature ever since the constitution was framed. It has also received the sanction of this court in the many cases which have been brought here from those courts by appeal and writ of error, in which solemn judgments have been pronounced without objection, and which would be void if the court of original jurisdiction had no legal existence. In the case of *The State v. Ebert*, 40 Mo. 186, this court sustained the act creating the St. Louis court of criminal correction and providing for the trials of misdemeanors by information, on the ground that it was necessary in a large city like St. Louis. So in the case of *The State ex rel. Dome v. Wilcox*, 45 Mo. 458, the same question was raised and decided in the same way in regard to the statutes authorizing cities, towns and villages to organize for school purposes. How was it any more necessary in these cases to resort to special laws than in the cases of common pleas courts and probate courts? Either class of enactments might be supplied by general laws, but the special laws are deemed much better, and therefore are considered necessary. Who is to decide when such necessity arises? The word "necessary" admits of all degrees of comparison. But a special law is scarcely absolutely necessary in any case, as in almost every case the particular end in view might be attained by a general law. The supreme court of Indiana, in the case of *Thomas v. Board of Commissioners*, 5 Ind. 4, stood upon the superlative degree and required the strictest construction of a similar clause in the constitution of that State, and said that in no case

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could a special law be resorted to where a general law would cover the case. I cannot see the force of the reasoning of the Indiana court in this case, and indeed the authority of the case is very much shaken, if not entirely set aside, in a subsequent case, where an act creating a new judicial circuit was upheld. See *Stocking v. The State*, 7 Ind. 328. It will be observed that the Indiana constitution, like our own, inhibited certain local and special acts of legislation, and then in a subsequent section (§ 23, art 4), it was provided that all laws should be general whenever a general law could be made applicable. In speaking of the law creating the judicial circuit, the court said: "This does not seem to us to be such a case, and even if we doubted we should be bound to throw the benefit of our doubt in favor of the constitutionality of the law."

If the court had been governed by the reasoning in the fifth volume, this law would have been set aside as unconstitutional, because there is no doubt the new circuit could have been provided for by framing a general law. Afterward, in 1868, the supreme court of Indiana, in an able opinion delivered by ELLIOT, J., reviews the case in 5 Ind. and expressly overrules it. But who is to decide when a general or a special law will answer the best purpose? It strikes me that this rule, in reference to general or special laws, is laid down as a guide for the legislature, and the legislature is to judge of the necessity of the particular case. The legislature is quite as able to do this as the courts. The legislature must, in the first instance, exercise their discretion as to the necessity of a special instead of a general act. How can the courts control that discretion? If a discretion be conceded at all, in my judgment the courts have no right to control it.

It is agreed that there is no discretion in regard to the passage of certain enumerated laws. They are inhibited by the letter of the constitution. When the legislature undertakes to pass these inhibited laws, it is the plain duty of the courts to declare them unconstitutional. But here we are asked to pronounce upon the necessity of a law, and whether it can be better supplied by a general law than a special act. This is the exercise of the discretion of the court to control the discretion of the legislature. I am not satisfied that this can be done. In *The State v. Hitchcock*, 1 Kan. 178, it was held that their constitutional provision, that, "*in all cases where a general law can be made applicable, no special law shall be enacted*," left a discretion with the legislature to deter-

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mine the cases in which special laws should be passed, and this discretion could not be interfered with by the courts. This doctrine, it seems to me, is supported by reason and the weight of authority.

But there is another clause in our constitution which may be invoked to uphold the authority of the legislature to pass this law. By section 1 of art. 6 it is provided that "the judicial power as to matters of law and equity shall be vested in a supreme court, in district courts, in circuit courts and in such other inferior tribunals as the general assembly may from time to time establish." Here the authority is expressly given without limitation to establish inferior tribunals "*from time to time*." It is not intended that they should all be established at one session or by one act, but "from time to time," as they may be needed. Some counties may need a common pleas court, a separate probate court, or a criminal court, while others are too sparsely settled to need them. Who is to judge of the time when the exigency arises? Is not this discretion expressly left to the general assembly by this clause of the constitution? How can the courts undertake to control this discretion? Whatever may be said in reference to other special laws, the power is necessarily implied, if not expressly given, by this clause of the constitution, to establish inferior tribunals by special acts. I feel satisfied that the act under consideration is not unconstitutional.

2. The next question is, was there such a vacancy in the office of judge of this court as to authorize the governor to exercise his power of appointment? The act vests the exclusive jurisdiction of probate matters in this court, and took effect the 1st day of June, 1872, but postpones the election of a judge until the general election in November. Who is to transact probate business in the mean time, unless a judge be appointed to fill the vacancy? The language of the constitution is, "when any office shall become vacant," etc., the governor may fill the vacancy. This is a new office created by this act, and *ipso facto* becomes vacant in its creation.

An existing office without an incumbent is vacant within the meaning of the constitution, and can be filled by the governor by appointment, unless an election or some other mode is plainly indicated. See *Stocking v. The State*, 7 Ind. 326.

In my opinion a judgment of ouster must be entered against the defendants.

WAGNER, J., dissented.

Brown v. The Hannibal and St. Joseph Railroad Co.

BROWN V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
appellant.

(80 Mo. 461.)

Negligence by railroad company — contributory negligence.

Plaintiff desired to cross defendant's track at a public crossing, but was prevented from doing so by a train of defendant's cars standing at that point. She then attempted to cross at another place, where there was no public crossing, and, in so doing, was struck and injured by defendant's car. *Held*, that, notwithstanding the fact that plaintiff was not rightfully on the track at the place of the injury, yet, if the injury might have been avoided by the use of ordinary care and caution by the defendant, the latter was liable therefor. (*See note, p. 425.*)

ACTION for damages. The opinion states the case.

Hall Oliver, for appellant.

Wm. Henry, Jr., for respondent.

WAGNER, J. This was an action commenced in the court below by the plaintiff for the purpose of recovering damages for personal injuries. It appears from the record that the plaintiff was in the town of Cameron, and wanted to cross the street where the defendant's track was laid upon the same; that before she arrived at the crossing she discovered that a train of cars was standing upon the track and the crossing was obstructed, so that she could not pass at that place. She then turned and crossed the track at a different place, where there was no public crossing, but there was a path where people were accustomed to cross occasionally, but it does not seem that the road had ever authorized anybody to cross at that particular place. When plaintiff went on the track there was an engine and tender standing about six feet distant, and as she had nearly crossed over, the cars commenced moving and the tender struck her, the wheels passing over one of her legs, just above the ankle, crushing it so that amputation became necessary. She swears that no signal was given of the moving of the train, and the first notice she had of the cars moving was being struck by them. There was

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no other evidence tending to prove that no bell was rung when the engine was started. On the other hand, there was evidence going to show that at the time the train was started the bell was rung and the alarm was given. Upon this state of facts the court made the following declarations of law for the plaintiff:

1. "If the jury believe, from the evidence, that the defendant, through the negligence or carelessness of its agents, and without negligence of plaintiff, inflicted upon the plaintiff the injury as mentioned in the petition, they will find for the plaintiff.

2. "Railroad companies, owing to the dangerous character of the business they engage in, are held to the greatest care in the operation of their machinery and vehicles ; and if the jury believe, from the evidence, that the defendant's agents or servants, in managing the locomotives or other machinery, failed to use such care and caution, by which the injury was done to plaintiff, they will find for plaintiff.

3. "Even if the jury should believe, from the evidence, that the plaintiff was guilty of negligence or carelessness which contributed to the injury, yet if they further believe, from the evidence, that the agents or servants of defendant, managing the locomotives or machinery of the defendant with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for plaintiff."

The court gave all the instructions asked for by the defendant except the sixth, which is as follows :

6. "If the jury believe, from the evidence, that the injury in proof happened on the railroad track of defendant, and where there was no street or road crossing, the plaintiff cannot recover, because the defendant, in the use of its road, is not bound to keep a lookout on its own ground, as against those who have no lawful right there, but may use the same for its own lawful purposes; and any one going on said track, where there is no street or road crossing, is there at his own peril and in his own wrong, and therefore cannot recover, because his own wrong has contributed to his own injury."

The point raised in this court, that the evidence did not correspond with the petition, we do not think can be maintained. The allegation in the petition was that the injury occurred at a public crossing, and the proof showed that it happened at a private crossing; but no objection was made to it on that account in the court below, and no advantage was attempted to be taken in the

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manner pointed out by statute. *Fischer v. Max et al.*, 49 Mo.; Wagn. Stat. 1033, § 1.

With the weight of testimony we have nothing to do. It is sufficient for us that both parties introduced evidence tending to prove their respective allegations. The authorities mostly cited and relied on by the defendant are from courts where the established law is that the courts themselves determine what is negligence, and take the case from the jury when, in their opinion, the evidence shows that the plaintiff has been guilty of any carelessness or negligence which contributed to the accident. But in this State a different rule prevails, and where there is any evidence in regard to the issues, the question of negligence must be submitted to the jury under instructions from the court.

To the first instruction given to the jury at the instance of the plaintiff no reasonable objection can be made. It makes the defendant liable, if its agents carelessly and negligently inflicted the injury, without the plaintiff being guilty of any negligence which contributed thereto. In reference to the second instruction, as applied to this case, there is some doubt. It asserts a correct proposition of law, and if the plaintiff was legally and rightfully on the track, of its application there could be no question. But, owing to the peculiar and clearly proved facts, we think this instruction may very properly be considered in conjunction with the next succeeding or third instruction, which is entirely unobjectionable. *Huel-senkamp v. Citizens' Railway Co.*, 57 Mo. 537; *Morrissey v. Wiggins Ferry Co.*, 43 Mid. 380; 47 id. 521.

The crossing was obstructed by the defendant's train, and the plaintiff, therefore, to pursue her journey, turned away and crossed at another place, where people were accustomed to cross, but it does not appear that they had any license therefor.

The defendant had the right to stop its train at the crossing for a reasonable time, but when the train did stop and obstructed the crossing for the purpose of unloading cars, as was the case here, were travelers always obliged to wait before they could continue their business, till the cars were unloaded? While the railroad company is the absolute owner of its track, and has the right to its free and unmolested use, still it is not absolved from the exercise of ordinary care and diligence to prevent injury to others when they happen on the track under the circumstances in which the plaintiff was placed. Greater care and foresight must necessarily be used

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within the limits of a town than would be required in the country. In towns caution should always be used. There is no absolute rule as to negligence to cover all cases. That which is negligence in one case, by a change of circumstances will become ordinary care in another, or gross negligence in a third. Circumstances, time and place must be taken into the account, and the relative degrees of care, or want of it, grow out of the surroundings and conduct of both parties. The degree of care required of persons having charge of locomotives and cars, upon tracks in towns, varies according to the circumstances of the case, and must be proportioned to the danger to be apprehended of inflicting injury upon others. The rule which would apply in one case, or at a certain given time, might be entirely inadequate as a test when applied to a different state of things. As the crossing was obstructed by the act of the defendant, and persons were in the habit of going over the private way, we think that the agents and servants of the defendant were bound to take notice of these facts, and use a precaution commensurate with them.

The instruction refused for the defendant proceeds upon the hypothesis that, as the plaintiff was on the road track, where there was no road or street crossing, she cannot recover, whether the defendant was negligent or not. This proposition, I admit, has many authorities to support it. But a contrary doctrine was quoted approvingly in this court in *Huelsenkamp v. Citizens' Railway, supra*, where cases were cited to show that for an injury negligently inflicted the defendant might be held liable, though the plaintiff was a trespasser. See *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29, per Lord DENMAN, C. J.; *Robinson v. Cone*, 22 Vt. 213; *Birge v. Gardiner*, 19 Conn. 507.

This principle springs immediately out of the common and familiar rule that every person shall use his own property so as not to hurt or injure another. It is in accordance with this principle that, though a person to do a lawful thing, yet if any damage thereby befalls another, which he could have avoided by reasonable and proper care, he shall make reparation. As before remarked, the defendant's right to the exclusive and unmolested use of its railroad track is undeniable. And we may concede for the argument that the plaintiff had no right to be on the track, and that she was there improperly, and still it does not follow that she cannot recover for an injury inflicted upon her negligently. The right

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of the defendant to the free, exclusive and unmolested use of its railroad is nothing more than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary or avoidable injury to another. The fact that one person is in the wrong does not, in itself, discharge another from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 172.

The cases are numerous where parties have been held responsible for their negligence, although the party injured was, at the time of the occurrence, culpable, and, in some of the cases, in the actual commission of a trespass. Thus, in *The New Haven Steamboat & Transportation Co. v. Vanderbilt*, 16 Conn. 421, the supreme court of Connecticut held it to be a principle of law that while a party on the one hand shall not recover damages for an injury which he has brought upon himself, neither shall he, on the other hand, be permitted to shield himself from an injury which he has done, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then it would seem that the party setting up such defense is bound to use common and ordinary caution to be in the right.

In *Birge v. Gardiner*, 19 Conn. 507, the same court says: "There is a class of cases in which defendants have been holden responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences." In the case of *Bird v. Holbrook*, 15 Eng. Com. Law, 91, it was held that where the defendant, who, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, having climbed over the wall in pursuit of a stray fowl, was shot, he, the defendant, was liable to damages, although the plaintiff brought the injury upon himself by trespassing upon the defendant's inclosures.

The case of *Vere v. Lord Cawdor*, 11 East, 568, was an action of trespass for shooting and killing a dog of plaintiff's, in which it was held that a plea in bar constituted no justification. It set forth that the lord of the manor was possessed of a close, and that the defendant, as his game-keeper, killed the dog when running after hares in that close for the preservation of hares, the plea not aver-

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ring that it was necessary to kill the dog for the preservation of the hares, etc. In this case Lord ELLENBOROUGH, C. J., said: "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, *which outrages all reason and sense*, it is of no authority to govern other cases."

To the same effect is the case of *The Mayor of Colchester v. Brooke*, 53 Eng. Com. Law, 376, cited in 1 Smith's Lead. Cas. 132, a, where it was held, that although the plaintiff was chargeable with wrong and negligence in placing and keeping the deposit of a bed of oysters in the channel of a navigable stream, which created a public nuisance, yet the defendant was not justifiable in running his vessel upon the deposit, greatly injuring the oysters, when there was room to pass in the stream without it; and the injury could have been avoided by the use of reasonable care and diligence.

These authorities might be greatly multiplied, but a sufficient number have been cited to show the established rule. And in the Ohio case before referred to it is declared by the court that "where a party has in his custody or control dangerous implements or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury, he may be entitled to redress." This we think is fully as broad as the instructions given in this case. The sixth instruction asked by the defendant and refused by the court was properly refused.

The instruction given for the plaintiff, under all the circumstances of this case, when taken together were not objectionable, and furnish no reason for a reversal. The judgment in the court below having been for the plaintiff, will be affirmed. The other judges concur.

NOTE.—In the recent case of the *Baltimore & Ohio R. R. Co. v. State*, 36 Md. 866, the court of appeals of Maryland held that where a person walking on a railroad track is run over and killed by an engine belonging to the railroad company, the company is responsible in damages for such killing, though the deceased was guilty of a want of ordinary care and prudence in so walking on the track, provided it appear that the accident would not have occurred if the agents of the railroad company had used, in running the engine which occasioned the killing, ordinary prudence and care in giving reasonable and usual signals of its approach, and in keeping a reasonable look-out. — REP.

KELLOGG, plaintiff in error, v. MALIN.

(50 Mo. 498.)

Covenants — seizin — against incumbrances.

Defendant conveyed to plaintiff, by a deed containing the usual covenants, land, part of which was occupied by a railroad. In an action upon the covenant of seizin, *held*, that the covenant of seizin was not broken; but, *semble* that the covenant against incumbrances was. (*See note, p. 481.*)

ACTION for damages for a breach of covenant of seizin in a deed of lands from defendant to plaintiff. The opinion states the case.

H. K. White, for plaintiff in error.

Donephan & Vories, for defendant in error.

WAGNER, J. Plaintiff brought suit against defendant, upon his covenant of seizin contained in a deed conveying certain real estate situated in Platte county. The breach assigned was that at the time of the execution and delivery of the deed the defendant was not seized in fee simple of a strip of land 100 feet wide running through the tract conveyed, but that the fee in such strip was then vested in the Platte County Railroad, by virtue of a decree rendered in the circuit court previous to the execution and delivery of defendant's deed, of which the company, at all times since the delivery of the deed, had held exclusive possession.

To this petition the defendant demurred, and assigned as reasons therefor that the petition did not state facts sufficient to constitute a cause of action, because "the location and use of a railroad over said lands in the petition named was and is a public, notorious act or fact, of which plaintiff was bound to take notice, and of which he was presumed to have had full notice; and all such notorious physical facts were to be taken into consideration in construing the deed and warranty therein, and were not covered by said warranty and were not in law a breach thereof.

The court sustained the demurrer and dismissed the petition, whereupon the plaintiff brought error.

The first question is, whether the railroad, by its proceedings for condemnation which resulted in the decree of the court, became

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invested with a fee-simple title in the strip of land, or whether it acquired a mere easement. It is well settled that the covenant of seisin is not broken by the existence of easements or incumbrances which do not strike at the technical seisin of the purchaser. Therefore the existence of a highway over part of the land conveyed is no breach of this covenant, since it has been firmly and consistently established that, although the public may have the right of passage over the way, the freehold technically remains in the owner of the soil. Rawle (3d ed.), 51; *Goodtitle v. Alker*, 1 Burr. 134; *Cortelyou v. Van Brunt*, 2 Johns. 357; *Jackson v. Hathaway*, 15 id. 449; *Lewis v. Jones*, 1 Barr, 336; *Peck v. Smith*, 1 Conn. 103.

By the first section of the act chartering the Platte County Railroad Company, power is given the company to take, hold, use and enjoy the fee-simple or other title in and to any real estate. The eighth section provides that where the owner of the land through which such road shall run shall refuse to relinquish the right of way to the road, the facts shall be stated to the circuit court, and the judge shall appoint three disinterested citizens to view the land, who shall take into consideration the value of the land, and the advantages and disadvantages of the road to the same, and report what damages will be done to the land. And the ninth section declares that if no valid objection be made to the report, the court shall enter judgment in favor of the owner, against the company, for the amount of the damages assessed, and shall make an order vesting in the company the fee-simple title to the land. R. R. Laws of Mo. 51, 52. It is true that in speaking of the title which the company acquire, the legislature here uses the term "fee simple;" but did it contemplate a fee simple according to the technical legal meaning of that term?

That a fee simple may be taken and acquired through the exercise of the power of eminent domain may be conceded. But that, I apprehend, would be where an absolute and unconditional price was paid for the property. In determining the consideration to be paid by these roads for the right of way, the benefits and advantages accruing to the owner are taken into calculation. The benefits and advantages, then, are considered as forming part of the purchase-money.

But suppose the road, after it is started, ceases to exist, and its operation is abandoned, will the land revert back to the owner

may the road keep and dispose of it for a purpose entirely different from that had in view when it was commenced? It seems to me there can be but one answer to this question. There might be cases where the commissioners and the court would not award the proprietor any thing more than nominal damages, believing that the benefits would be greater than the value of the land; and in such a case, if the road should cease or be abandoned, the owner would be deprived of his estate without any compensation. In the matter of highways, where lands have been taken and appropriated in this way, it has never been held that any thing more than an easement passed by the condemnation and the payment of the amount or damages assessed.

The use is vested in the public, but the reversionary title still continues in the owner of the soil. In my opinion, notwithstanding the language used, nothing more than an easement passed to the road, giving it perpetual and continuous title so long as it used the land for the purpose for which it was taken, but, when that use was abandoned, then it would revert back to the owner of the premises.

We do not think, then, there was any technical breach of seizin as set forth in the petition.

Some conflict of authority has existed, and still prevails, as to whether the existence of a public road or highway over the property is a breach of any of the usual covenants. The prevailing opinion, however, is that it is a breach of the covenant against incumbrances.

In an early case in New York, although the question was not directly decided, yet a strong doubt was expressed whether a public road could properly be deemed an incumbrance. *Whitbeck v. Cook*, 15 Johns. 483. "It must strike any one with surprise," said SPENCER, J., in that case, "that a person who purchases a farm through which a public road runs at the time of the purchase, and had so long run before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm."

In Pennsylvania the question was directly presented in *Patterson v. Arthurs*, 9 Watts, 152, and the court expresses its surprise that a

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highway should ever have been imagined an incumbrance within the covenants, and the belief that it had been the universal understanding of both sellers and purchasers in Pennsylvania that the covenant against incumbrances did not extend to public roads. This case, however, was not an action brought on a covenant against incumbrances, but an action for an installment of the purchase-money by the vendor. This doctrine was affirmed in *Dobbins v. Brown*, 12 Penn. St. 80, but the court went on to say that if a person purchased land without having seen it, upon the representation of the vendor, where its value was materially lessened by a public highway being located upon it, which circumstance was not made known to or was concealed from the purchaser, the latter might obtain redress by an action on the case for deceit; or, in an action brought against him for the purchase-money, might have compensation made by a deduction therefrom.

The courts of Pennsylvania are the only ones that have decided the question directly in the negative; and Mr. Rawle, in explaining why it was regarded as a general understanding to that effect, says that it was originally agreed by Penn, at the formation of the colony, that there should be laid out "great roads from city to city;" and as the wild state of the country rendered it impossible to be done otherwise than very gradually, it became the custom of the proprietaries, and afterward of the Commonwealth, to allow all the grantees of vacant land an addition in the proportion of six acres for every hundred, as a compensation for the roads that should thereafter be opened. This was so universal that, although the declaration of rights in the constitution provided that no man's property should be taken or applied to public use without just compensation being made, it was held that the law authorizing a turnpike to lay out and open roads without compensation was no infringement of the constitution, such compensation having been originally made in each purchaser's particular grant. *McClenachan v. Corwin*, 3 Yeates, 373. And from this circumstance, and the fact that it had been considered that the running a road through a man's land conferred such a benefit upon him as to fully compensate him, is traced the common understanding which forms the basis of the decisions. But in an early case in Massachusetts the action was on a covenant, and the breach assigned was the existence of "a public town road or way, duly laid out by the town of A., for the use of all its inhabitants," which was held to be an incumbrance. In delivering the

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opinion of the court PARSONS, C. J., said: "It is a legal obstruction to the purchaser to exercise that dominion over the land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable or merely nominal. The amount of damage is a proper subject of consideration for the jury who may assess them, but it cannot affect the question whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid."

Kellogg v. Ingersoll, 2 Mass. 101. This case has been approved and sustained in all the New England States, and it is now considered as definitely settled there that a public highway does constitute a breach of the covenant against incumbrances. *Herrick v. Moore*, 19 Me. 313; *Haynes v. Young*, 36 id. 560; *Pritchard v. Atkinson*, 3 N. H. 335; *Butler v. Gale*, 27 Vt. 742; *Parish v. Whitney*, 3 Gray 516; *Hubbard v. Norton*, 10 Conn. 431.

Where the question has come up, the same doctrine has been approved in the Western States. Thus, it was held that where the owner of a tract of land had conveyed to a railroad company a right of way over the same, upon which the company had built and were operating their road, and subsequently thereto such owner conveyed the same land to another by a deed purporting to pass the fee to the entire tract, without any reservation in respect to such right of way, the easement so held by the railroad company was an incumbrance on the land, and its existence constituted a breach of a covenant against incumbrances contained in the deed, for which the covenantee might maintain his action. *Beach v. Miller*, 51 Ill. 206. So, in Iowa, it has been decided that a right of way for a railroad is an incumbrance for which a grantee may recover, under a covenant against incumbrances, though he had full knowledge of each incumbrance at the time he accepted the deed. *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Barlow v. McKinley*, 24 id. 69.

All the authorities concur in holding that an easement constitutes an incumbrance. If a person acquires the fee to land free and unincumbered, he obtains the exclusive and absolute dominion over it, and may use, enjoy and appropriate it to any purpose he may see fit. But if it is subject to an easement or an incumbrance it is not free, nor can he enjoy it to the fullest extent. If a public highway or a railroad track runs over it he cannot have its unobstructed enjoyment, for it is used by others in defiance of his will.

When a purchaser obtains title by deed without covenants, he, of

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course, takes it subject to all defects and incumbrances it may be under at the time of the conveyance. But if he insists upon and obtains covenants for title, he has the right, when obtained, to rely upon them and enforce their performance, or recover damages for their breach. The vendor is not compelled to make covenants when he sells land; but, having done so, he must keep them, or respond in damages for injuries sustained by their breach. Nor is it a relief or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when made. A person may warrant an article to be sound when both buyer and seller know it to be unsound; so the seller may warrant the quantity and quality of an article he sells, when both parties know it is not of the quantity or quality warranted. The usual reason why a purchaser insists upon covenants for titles or a warranty of quality or quantity, is because he fears that the title is not good, or that the article lacks either in quantity or quality.

Then, as a highway or a railroad located and running over one's land is an incumbrance, and to a greater or less degree obstructs and incumbers the free use and enjoyment of the land, it follows that a person selling land thus incumbered, and covenanting that it is not, must be held to perform his covenant by its removal, or respond in damages.

The points raised in the demurrer, therefore, were not all well taken, but the judgment must be affirmed, because the allegations in the petition set out no cause of action — a breach of seizin only being averred.

Judgment affirmed. The other judges concur.

NOTE. — See *Bench v. Miller*, 2 Am. Rep. 290 (51 Ill. 306), wherein it was held that the right of way of a railroad is a breach of a covenant against incumbrances. See, also *Lamb v. Danforth*, 8 Am. Rep. 426. — RRP.

MARX v. FORE, plaintiff in error.

(51 Mo. 69.)

Foreign judgment — how far conclusive.

In a suit brought upon a judgment rendered in another State, the record of which showed that the defendant appeared and pleaded therein, defendant set up in answer that he was never served with process in the original action, did not know of the action, and did not authorize any one to appear for him, and that he had a good defense to such action upon the merits. *Held* (WAGNER, J., dissenting), that the answer was good. (*See note, p. 435.*)

THE opinion states the case.

J. B. Dennis, for plaintiff in error.

G. H. Green and Louis Henck, for defendant in error.

BLISS, J. This was a suit upon the record of a judgment rendered in Mississippi, and though many questions are raised, I will consider but one. For one of his defenses the defendant set forth the alleged indebtedness for which the judgment was rendered, charged that it was paid off and discharged before the suit was instituted; that he had left Mississippi and was not a resident of that State when it was instituted; that no service of process was had upon him; that he did not know of the suit and never authorized any one to appear to it for him. The Mississippi record shows appearance by attorney and plea, and that part of the answer setting forth the above facts was, on motion of plaintiff, stricken out. The present record shows that it was not stricken out for defect or informality, but upon the ground that the judgment could not be thus impeached.

Counsel have discussed the vexed question whether this Mississippi record imported absolute verity, so that the recital of service and defendant's appearance could not be contradicted, and have cited authorities upon both sides. The affirmative of this question was taken by this court in *Warren v. Lusk*, 16 Mo. 102, and if the language of Judge SCOTT is to be taken literally, a judgment, though rendered without appearance in fact or notice to defendant, must be paid by him, or he must go to the State where it was rendered — perhaps to Oregon or Maine — and move to set it aside.

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But we are not to understand the language of the court as shutting off equitable defenses. That question was not before it, and when the judge says that recitals import absolute verity, and that defendant is estopped from disputing them, he only means that the judgment is to have the force of a domestic one, which must be attacked by a direct proceeding.

That a judgment may be impeached for fraud or mistake cannot be questioned. *Rogers v. Gwinn*, 21 Iowa, 58; *Pearce v. Olney*, 20 Conn. 544; *Christmas v. Russell*, 5 Wall. 290. If it be a domestic one, a motion, if made in season, will reach it, and is a proper remedy. *Downing v. Still*, 43 Mo. 309. It may also be set aside by error or bill. "Courts are in the constant habit of relieving parties upon equitable terms from judgments rendered against them in consequence of the fraudulent acts of the successful party or his attorney" (*Rogers v. Gwinn, supra*); and what greater fraud than falsely to enter an appearance in order to obtain jurisdiction over a defendant?

The only question, then, is, whether the judgment may be attacked, and the want of jurisdiction and the fraudulent simulated appearance be shown by answer, or whether the party, who is not supposed to know of its existence and sued upon it, shall be compelled to go to the State where it was rendered, and there proceed directly to overthrow it. I infer that the latter will not be required, from several considerations. First, the suit is upon a judgment. If obtained by fraud and without jurisdiction, it is no judgment — is void and will be so declared if the fact is made to appear; the defense goes to its very existence. Second, citizens are not driven to foreign States to protect their rights. If they have a legal right, or are being subjected to a wrong, they may look for protection to the tribunal having jurisdiction over them and the subject-matter, if the opposing party has placed himself within this jurisdiction. Third, it would, in many cases, be oppression or an absolute denial of justice. The inconvenience and expense of going to a distant State, of there employing counsel and litigating the matter, would often be so great that the suffering party would rather pay a pretty large judgment, although fraudulently obtained, than to undertake to set it aside. And besides he might not succeed in his direct proceeding abroad until long after it had been collected at home. Fourth, the statute expressly authorizes equitable defenses, and provides for affirmative relief, where, under the old system, a bill was

necessary under which a suit in chancery was instituted. Now, if the subject-matter of the bill shows a defense to a pending suit, it may be set out as a defense by way of answer.

The error of the court below was in striking out a defense of this character. It did not distinguish between the old plea in bar and the setting forth of facts which in equity should destroy the judgment. We may adhere to *Warren v. Lusk*, and still permit a party to allege and show that the judgment was obtained by such fraud as went to the jurisdiction of the court, and to do this we will not compel him to go to the *situs* of a foreign judgment, but permit him to make it as a defense whenever and wherever such judgment is sought to be enforced. I say nothing of any other fraud except that which would go to the jurisdiction. If that was obtained, the party may be required to attack the judgment where rendered. But in this view it would not be sufficient to simply set out the fraudulent appearance, but he must show that he was injured by it; for, if he has no defense to the claim, there is no warrant for equitable interference. In the case at bar he has done both, and if the facts set forth in the answer which was stricken out are true, the plaintiff is not entitled to judgment.

I have said nothing to impugn the authority of *Warren v. Lusk* in a proper case. But if it is considered to warrant the action of the court below in the case at bar, it so far goes beyond the received interpretation of the constitutional provisions requiring credit to be given to the judgments of other States. The rule is that they are to be just as conclusive as domestic judgments, *with this exception*, that "they are open to inquiry as to the jurisdiction and notice to defendant" (*Christmas v. Russell*, 5 Wall, 305), and this inquiry can be made notwithstanding the recitals. *Harris v. Hardeman*, 14 How. (U. S.) 334, quoting and approving the emphatic language of MARCY, J., in *Starbuck v. Murray*, 5 Wend. 156; *Kerr v. Kerr*, 41 N. Y. 272; *Rape v. Heaton*, 9 Wis. 328; *Pollard v. Baldwin*, 22 Iowa, 328.

The reasoning of MARCY in *Starbuck v. Murray*, as quoted and approved in *Harris v. Hardeman*, is unanswerable. After citing many authorities he says: "This doctrine does not depend merely upon adjudged cases. It has a better foundation; it rests upon a principle of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken

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from him by a judicial sentence without the privilege of showing, if he can, the claim against him to be unfounded.

"But it is contended that if the other matter may be pleaded by defendant, he is estopped from asserting any thing against the allegation contained in the record. It imports perfect verity it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore that the supposed record is in truth no record. If the defendant did not have proper notice of and did not appear to the original action, all the State courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the incontrovertible verity of the record, he is deprived of his defense by a process of reasoning that to my mind is little less than sophistry. The plaintiffs in effect declare to the defendant the paper declared on is a record because it says you appeared, and you appeared because the paper is a record."

Reliance is had, in favor of the doctrine of absolute verity, upon *Mills v. Duryee*, 7 Cranch, 481; but that case has not been generally followed, at least in the sense now sought to be given it. A party about to perpetrate a fraud by obtaining judgment against one without his knowledge, would of course see that the record showed an appearance, and to estop the latter from showing the record to be a nullity would offer a bounty to such frauds. Counsel rely upon *Christmas v. Russell*, 5 Wall. 290, but the question could not arise in that case, inasmuch as the party had appeared and made defense, and upon other questions the record was conclusive.

Judge ADAMS concurring. The judgment will be reversed and the cause remanded.

WAGNER, J., delivered a dissenting opinion.

NOTE.—See *Dunlap v. Cody*, 7 Am. Rep. 129, and the note thereto, wherein the authorities on the question are collated. See, also, *Mellhop v. Doane*, 7 id. 142; *McLaren v. Kehler*, 8 id. 591; *Kinnier v. Kinnier*, 6 id. 182. The United States supreme court, at the October term, 1872, rendered the following judgment as to the conclusiveness of a judgment of another State. The case was *Thompson v. Whitman*, in error to the circuit court of the United States, for the southern district of New York. The opinion has not yet been reported.

Mr. Justice BRADLEY delivered the opinion of the court.

This is an action of trespass for taking and carrying away goods, originally brought in the superior court of New York city, and removed by the defendant (now plaintiff

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in error) into the circuit court of the United States. The declaration charges that on the 26th of September, 1862, the defendant, with force and arms, on the high seas, in the outward vicinity of the narrows of the port of New York, and within the southern district of New York, seized and took the sloop Ann L. Whitman, with her tackle, furniture, etc., the property of the plaintiff, and carried away and converted the same. The defendant pleaded not guilty and a special plea in bar. The latter plea justified the trespass by setting up that the plaintiff, a resident of New York, on the day of seizure, was raking and gathering clams with said sloop in the waters of New Jersey, to wit, within the limits of the county of Monmouth, contrary to a law of that State, and that by virtue of said law the defendant, who was sheriff of said county, seized the sloop within the limits thereof, and informed against her before two justices of the peace of said county, by whom she was condemned and ordered to be sold. In answer to this plea the plaintiff took issue as to the place of seizure, denying that it was within the State of New Jersey, or the county of Monmouth, thus challenging the jurisdiction of the justices, as well as the right of the defendant to make the seizure. On the trial conflicting testimony was given upon this point, but the defendant produced a record of the proceedings before the justices, which stated the offense as having been committed, and the seizure was made, within the county of Monmouth, with the history of the proceedings to the condemnation and order of sale. The defendant claimed that this record was conclusive both as to the jurisdiction of the court and the merits of the case, and that it was a bar to the action, and requested the court so to charge the jury. But this was refused, and the court charged that the said record was only *prima facie* evidence of the facts therein stated, and threw upon the plaintiff the burden of proving the contrary. The defendant excepted, and the jury, under the direction of the court, found for the plaintiff generally, and, in answer to certain questions framed by the court, found specially, first, that the seizure was made within the State of New Jersey; secondly, that it was not made in the county of Monmouth; thirdly, that the plaintiff was not engaged on the day of the seizure in taking clams within the limits of the county of Monmouth. Judgment being rendered for the plaintiff, the case is brought here for review.

The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated, with due particularity, sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another State? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true that the court charged generally that the record was only *prima facie* evidence of the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specially thereon, the charge may be regarded as having reference to the question of jurisdiction. And if upon that question it was correct, no injury was done to the defendant.

Without that provision of the constitution of the United States which declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," and the act of congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth county jurisdiction, whatever might be its effect in New Jersey. In any other State it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. "Upon principle," says Chief Justice MARSHALL, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, capacity of the court to act upon the thing condemned, arising from its being within

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or without, its jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." *Ross v. Hinchey*, 4 Cranch, 289. To the same effect see Story on the Constitution, chap. XXIX; 1 Greenleaf on Evidence, § 540.

The act of congress above referred to, which was passed 28th of May, 1790 (1 Stat. 122), after providing for the mode of authenticating the acts, records and judicial proceedings of the States, declares, "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are rendered. And the language of this court in *Mills v. Duryee*, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each State the same conclusive effect, as records, in all the States, as they had at home; and that *null debet* could not be pleaded to an action brought thereon in another State. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice STORY, who pronounced the judgment in *Mills v. Duryee*, in his Commentary on the Constitution, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one State in every other State, adds: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The constitution did not mean to confer upon the States a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." Com. on Const., § 1818. In the Commentary on the Conflict of Laws, § 609, substantially the same remarks are repeated, with this addition: "It" (the constitution) "did not make the judgments of other States domestic judgments to all intents and purposes; but only gave a general validity, faith and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Many cases in the State courts are referred to by Justice STORY in support of this view. Chancellor KENT expresses the same doctrine in nearly the same words, in a note to his Commentaries, vol. 1, p. 281. "The doctrine in *Mills v. Duryee*," says he, "is to be taken with the qualification that, in all instances, the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *null debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the *cause*, but of the *parties*, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another State, to be valid, must deny, by positive averments, every fact which would go to show that the court in another State had jurisdiction of the person, or of the subject-matter." See, also, 2 Kent's Com. 95, note, and cases cited.

In the case of *Hampton v. McConnel*, 8 Wheat. 234, this court reiterated the doctrine of *Mills v. Duryee*, that "the judgment of a State court should have the same credit, validity and effect in every other court of the United States which it had in the State courts where it was pronounced; and that whatever pleas would be good to a suit therein in such State, and none others, could be pleaded in any court in the United States. But in the subsequent case of *McElmoolle v. Cohen*, 18 Peters. 312, the court

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explained that neither in *Mills v. Duryee*, nor in *Hampton v. McConnell*, was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, etc.; or pleas denying the jurisdiction of the court in which the judgment was given; and quoted, with approbation, the remark of Justice STORY, that "the Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State."

The case of *Landes v. Brant*, 10 How. 343, has been quoted to show that a judgment cannot be attacked in a collateral proceeding. There a judgment relied on by the defendant was rendered in the territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form, "And now at this day come the parties aforesaid by their attorneys," etc. The court pertinently remarked that the defendant may have left behind counsel to defend suits brought against him in his absence, but that if the recital was false and the judgment voidable for want of notice, it should have been set aside by *audita querela* or motion in the usual way, and could not be impeached collaterally (p. 371). Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of *Shumway v. Stillman*, 6 Wend. 453; *Aldrich v. Kinney*, 4 Conn. 380; and *Price v. Ward*, 1 Dutch. 225. The remark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was, in effect, overruled by the subsequent cases of *D'Arcy v. Ketchum* and *Webster v. Reid*. *D'Arcy v. Ketchum*, 11 How. 165, was an action in the circuit court of the United States for Louisiana, brought on a judgment rendered in New York under a local statute, against two defendants, only one of whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that State; that the constitutional provision and act of congress giving full faith, credit, and effect to the judgments of each State in every other State do not refer to the judgments rendered by a court having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of retrying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding. But this uncertainty and confusion related only to valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or (as might have been added) in proceedings *in rem*, where the court had jurisdiction of the res. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction. "The international law as it existed among the States in 1790," say the court, "was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force. Subject to this established principle congress also legislated, and the question is whether it was intended to overthrow this principle and to declare a new rule, which would bind the citizens of one State to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the States where made (p. 176).

In the subsequent case of *Webster v. Reid*, 11 How. 437, the plaintiff claimed by virtue of a sale made under judgments in behalf of one Johnston and one Brigham against "The Owners of Half-Breed Lands lying in Lee county," Iowa territory, in pursuance of a law of the territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication as required by the act. This court held that, as there was no

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service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

In *Harris v. Hardeman et al.*, 14 How. 334, which was a writ of error to a judgment held void by the court for want of service or process on the defendant, the subject now under consideration was gone over by Mr. Justice DANIEL at some length, and several cases in the State courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of *Borden v. Fitch*, 15 Johns. 141, and *Starbuck v. Murray*, 5 Wend. 156; and from the latter the following remarks were quoted with apparent approval: "But it is contended that if other matter may be pleaded by the defendant he is estopped from asserting any thing against the allegation contained in the record. It imparts perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. * * The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle."

The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in *D'Aroy v. Ketchum*.

Thus, in *Christmas v. Russell*, 5 Wall. 390, where the court decided that fraud in obtaining a judgment in another State is a good ground of defense to an action on the judgment, it was distinctly stated in the opinion that such judgments are open to inquiry as to the jurisdiction of the court, and notice to the defendant (p. 395). And in a number of cases, in which was questioned the jurisdiction of a court, whether of the same or another State, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus, in *Elliott et al. v. Petrol et al.*, 1 Pet. 323, 340, it was held that the circuit court of the United States for the district of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice TRIMBLE, delivering the opinion of this court in that case, said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The same views were repeated in *The United States v. Arredondo*, 2 Pet. 279; *Voorhees v. Bank United States*, 10 id. 475; *Wilcox v. Jackson*, 13 id. 511; *Shriver's Lessee v. Lynn*, 2 How. 59, 60; *Hickey's Lessee v. Stewart*, 3 id. 763; and *Williamson v. Berry*, 8 id. 540. In the last case the authorities are reviewed, and the court say: "The jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings;" and "the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States."

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the

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right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like assertions of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to impart absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force.

It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other States than have the courts of New Jersey. The subject was examined and the doctrine affirmed, after a careful review of the cases, in the case of *Moulin v. Insurance Co.*, 4 Zab. 223; and again in the same case in 1 Dutch. 57, and in *Pries v. Ward*, id. 225; and as lately as November, 1870, in the case of *Mackay et al. v. Gordon et al.*, 34 N. J. 283. The judgment of Chief Justice BRASLEY in the last case is an able exposition of the law. It was a case similar to that of *D'Aroy v. Ketchum*, in 11 How., being a judgment rendered in New York under the statutes of that State, before referred to, against two persons, one of whom was not served with process. "Every independent government," says the chief justice, "is at liberty to prescribe its own method of judicial process and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a State against a citizen of such State, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign State."

On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

CITY OF ST. CHARLES, appellant, v. NOLLE

(51 Mo. 122.)

Municipal corporation — ordinance.

A city was authorized by its charter to provide by ordinance for "licensing, taxing and regulating hacks, drays, wagons and other vehicles, used within the city for pay." *Held*, that an ordinance, licensing and taxing vehicles used in hauling into and out of the city was void, as not being authorized by the charter and, *semble*, that the legislature could give no authority to pass such an ordinance.

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THE opinion states the case:

F. McDearmon, for appellant.

T. Bruere, for respondent.

ADAMS, J. This was a prosecution commenced before the recorder of the city of St. Charles, charging the defendant with violating an ordinance of the city requiring a license tax for wagons used for pay, from which an appeal was taken to the circuit court, where the defendant was acquitted on the ground that the alleged ordinance is invalid. The case was tried on the following agreed statement of facts: "Nolle, the defendant, was hauling lumber for Hallrah & Macheus from Judges Landing on the Mississippi river about seven miles below the city of St. Charles, to their lumber yard in the city of St. Charles, without first having taken out a license under the above ordinance as a drayman or wagoner. Nolle is a farmer and non-resident of the city, living about five miles below the city in the neighborhood of said landing. He does not make hauling for hire, his regular business, but did the hauling in this instance for compensation. The above ordinance and original ordinance are considered in evidence.

The ordinance referred to is to the effect, "that every owner or driver of any dray, cart or wagon used or kept to carry or convey goods, wares or merchandise or any species of property or thing for hire, from one part of the city to another part, or *from places within the city to places without the city, or from places without the city to places within the city*, shall register and number the same with the city register," give bonds, etc., etc.

The charter of the city of St. Charles provides that "the mayor and councilmen shall have power, by ordinance, to provide for licensing, taxing and regulating hacks, drays, wagons and other vehicles used within the city for pay." It is also provided by the charter that "they shall have power to pass ordinances for the regulation and police of said city, and the commons, thereunto attached and belonging, as the said mayor and councilmen shall deem necessary to carry into effect the object of this act, and the power hereby granted as the good of the inhabitants may require."

These are all the provisions of the charter bearing on the question. A city can only pass such ordinances as are warranted

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by its charter. There seems to be no authority, expressed or implied, in the charter of the city of St. Charles to authorize the imposition of a tax license on wagons engaged in hauling outside of the city.

It was not contemplated by the legislature that the free ingress, egress and regress of outside citizens should be impeded by taxation to be imposed by the city. It cannot be found in that part of the charter allowing tax license to be imposed on wagons, etc., used for pay in the city. The language used excludes such interpretation — "*expressio unius exclusio alterius*."

The conclusion cannot be drawn from the authority to regulate the police of the city, for that must be confined to the city limits.

Besides, if the legislature had given the power in so many words, in my judgment, such legislation would have been void as going beyond the limitation of legislative power. Although there may not be any express limitation on legislative power in our State constitution, in many instances the very nature of our State governments and the purposes for which they were created, must form a barrier to legislation which deprives one portion of the community of its property for the benefit of others.

The proper construction of the constitution in regard to taxing private property for public use is that it can be taken only for public use and not for private use at all, and when taken for public use there must be a just compensation allowed and paid. To tax occupations outside of the city, for the benefit of those living in the city, is in effect taking the property of the citizens for private use; that is, for the use of a particular community, of which the outside citizens form no part. Whether it be called a tax or the appropriation of property, the result is precisely the same. In *Wells v. The City of Weston*, 22 Mo. 384, Judge LEONARD, in an able opinion which was concurred in by the whole court, vindicated the position here assumed.

The legislature had undertaken to empower the city of Weston to tax lands adjoining the city, to the extent of half a mile, for local purposes; and the city under this authority imposed taxes which the plaintiff Wells resisted. The court pronounced the law unconstitutional. I am aware that in Virginia, in *Langhoren & Scott v. Robinson*, 20 Gratt. 661, a question somewhat similar arose and by a divided court the constitutionality of the act of the Virginia legislature was upheld as being consistent with the constitution of 1830. The town of Lynchburg was authorized to issue bonds for

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stock in the Lynchburg & Tennessee Railroad Co. bearing six per cent interest, and for payment to levy taxes upon the lands, property and persons of all those within the town proper and for half a mile beyond its limits. The opinion of the court was based upon the taxing power of the State legislature, and as there was no constitutional limitation on this power, the court held that the legislature could transfer this power to any particular municipality or body of men, to be exercised by them instead of the legislature. The case of *Wells v. The City of Weston* was not referred to by the Virginia court, and the line of reasoning maintained by our court was wholly ignored by Judge JONES in the Virginia case. We must adhere to the principles laid down by our own court as being more consonant with the implied limitations on all governments, which are only created for the protection of the citizen in his person and property.

"Power to violate those rights," says Judge LEONARD, "would seem to be quite beyond the lawful authority of any government, and certainly the legislative department of this government cannot arbitrarily take the property of one citizen and give it to another, and of course cannot authorize others to do so." *Wells v. Weston*, above referred to.

So much of the ordinance under consideration as attempted to impose a tax upon wagons hauling into and out of the city, we think was void as not being authorized by the charter, and, in my opinion, the legislature could give no authority to pass such an ordinance.

The judgment must be affirmed. Judge WAGNER concurs. Judge BLISS absent.

THOMPSON, appellant, v. NORTH MISSOURI RAILROAD COMPANY.

(51 Mo. 190.)

Negligence.

Declaration against a railroad company for negligence whereby plaintiff was injured, not averring that he was himself in the exercise of due care, *Acid, good.*

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THE opinion states the case.

R. T. Prewitt, for appellant.

J. N. Litton, for respondent.

WAGNER, J. In substance, plaintiff alleged in his petition that he was a passenger on the defendant's road, and that in getting off of the cars, through the carelessness and negligence of the defendant and its agents, he was injured, for which he asks damages. The circuit court sustained a demurrer to the petition, because there was no averment that the plaintiff at the time was exercising due care and was himself without negligence contributing to the injury. The sole question is whether it was necessary to make this allegation, or whether it was matter which properly devolved on the defendant to set up in the answer, and rely upon in defense.

The question as to burden of proof in respect to plaintiff's freedom from negligence, and as to whether he should make the affirmative averment, that he exercised proper care and was free from negligence, is new in this court, and is involved in uncertainty by the conflicting and evasive decisions of the courts of other States. While some courts hold that he must allege and affirmatively establish that he was free from culpable negligence contributing to the injury, others hold that his negligence is matter of defense, of which the burden of pleading and proving rests upon the defendant.

In my view the latter is the correct doctrine. Negligence on the part of the plaintiff is a mere defense, to be set up in the answer and shown like any other defense, though of course it may be inferred from the circumstances proved by the plaintiff upon the trial. It seems to be illogical and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind. In an ordinary complaint upon negligence, it is not necessary to aver that the plaintiff has taken due care. It is true the action may be defeated by showing that the plaintiff was guilty of such contributory negligence as would preclude a recovery, but that is a question for the jury, to be determined upon the evidence, and not a matter of pleading. I cannot see what possible ground of distinction there can be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*. Yet it would be difficult to

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find a case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault. Shearm. & Redf. on Negl. 47.

The petition, I think, stated facts sufficient to require the plaintiff to answer. The judgment should therefore be reversed and the cause remanded.

All the judges concurring.

BRIGGS v. EWART, appellant.

(51 Mo. 244.)

Promissory note — fraud in obtaining.

Defendant made a promissory note, being fraudulently induced by the payee to suppose that he was signing an instrument of a different character. *Held*, that the note was void in the hands of a *bona fide* holder for value before maturity. (See note, p. 449.)

THE opinion states the facts.

Phillips & Vest, for appellant.

Snoddy & Bridges, for respondent.

ADAMS, J. This suit originated before a justice of the peace, and was founded on the following note:

“\$150.

SEDALIA, February 24, 1870.

“On or before the 10th day of June, 1870, for value received, I the subscriber, of Mt. Sterling township, county of Pettis, State of Missouri, promise to pay S. R. Squier or order, one hundred and fifty dollars, without discount or defalcation, and with interest at 10 per cent from date, at Sedalia, Mo., P. O.

“DAVID EWART.”

A judgment was rendered against the defendant by the justice, from which he appealed to the common pleas court.

On the trial in the common pleas, evidence was given conducing

to show that the defendant's signature to the note was obtained by Squier, the payee, in the following manner: He went to defendant's house late in the evening and proposed to sell his son a patent pump; he had been there before for that purpose and the defendant had advised his son not to purchase. Squier brought a model of the pump with him and proposed to appoint the defendant's son agent for the sale of the pumps, and the son agreed to take the agency. The defendant agreed to vouch for his son, and a contract of agency was produced by Squier, by which Squier made the son agent, and the son with the defendant signed the agency contract to account for the proceeds of sales, etc. This was after dark and a lamp was lighted. Squier then produced a printed order with necessary blanks for the defendant to sign and keep as the form of an order for pumps to be sent to the agent. The defendant read over this form and signed and retained it. Squier then rose to his feet and seemed in a great hurry to start, and drew out what he said was a copy of the order and that the defendant must sign it to send off at once to New York for the pump — that he would take it right into town with him and mail it that night. He said the papers were just the same. They looked just alike. He hurried up defendant, had his own pen and ink with him, and defendant signed the paper as and for an order for a pump. Defendant in his evidence stated he never signed the paper as a note, but as an order. That he never delivered any paper to Squier as a note, and the only papers he intended to make were the agency contract and the order for a pump. That Squier took his paper off with him as an order for a pump.

On the part of the plaintiff it was in evidence that he purchased the note from Squier for \$125, without any knowledge or notice of the alleged fraud in obtaining the signature of the defendant. That Squier sold it to him a short time after its date and before maturity.

This suit was brought by plaintiff as assignee of the note.

The defendant asked the court to declare the law to be, that "although the court should find from the evidence that the defendant did write his name on or to the paper herein sued upon, yet, if the court further finds from the evidence that the signature of defendant was obtained thereto without the fault or negligence of defendant, on the fraudulent representations of the payee that the paper to which it was put was a mere duplicate of the order read in evidence, and that the defendant neither knew it was a note, nor

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intended to sign a note, but supposed it was such a duplicate, and that the plaintiff did not pay therefor a full and valuable consideration, then the court will find the issues for the defendant."

Other instructions not covering the point raised by this one were given and refused, and some were given for plaintiff in conflict with this instruction. The verdict and judgment were for plaintiff. The instruction above set forth raises the only point necessary for us to consider.

It may be assumed as an axiom too well settled to be disputed, that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing, and may have been written by himself, yet if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper and not the one he really signed, he ought not to be bound by such signature. In the execution of instruments of writing, such as contracts, deeds, etc., the mind must act intelligently, and the instrument must not only be signed but delivered by the party as, and for what he intended it for.

Commercial paper is no exception to this rule, only that in some cases a party knowingly putting his name to such paper may, by his own negligence, be estopped from disputing its execution as against an innocent holder for value.

For instance, if a person knowingly signs a negotiable note and it is stolen from him and gets into the hands of an innocent holder before maturity, he must suffer the consequence of his own negligence. In such case he knows that he has signed a note, and that it only needs delivery to constitute a valid instrument. So when it is delivered, no matter by whom, to an innocent holder, he is estopped by his own negligence from denying that he authorized its circulation. It was his own folly to sign the note and leave it in existence. But if a party is compelled by duress to sign a note, or is insane when he signs it, or signs a blank paper for no purpose at all, and leaves it on his table, and a note be written over it and put into circulation without his knowledge, I know of no principle of commercial or other law that will compel him to pay it, whether in the hands of an innocent holder or not. The point is that the mind must act in the execution of the paper. It must be executed as and for the paper it purports to be. If the mind is drawn away from it by fraud or otherwise, and the party is induced to and for another instrument different from what it purp

then there is no consent given and no delivery made or authorized to be made of the paper so signed. If such paper purports to be a negotiable note it is void as to the payee and all other holders, whether innocent purchasers or not.

Parties dealing in commercial paper must ascertain whether it was knowingly signed or authorized to be signed by the payee, and this is the only inquiry an innocent purchaser is bound to make.

If the evidence given on behalf of the defendant be true, his name was obtained to the note without his consent. He did not know that it was a note, but believed it to be a mere order for a pump, and signed and delivered it as such and not as a note.

I have not been able to find any direct authority in conflict with these views. In the case of *Clark v. Johnson*, 54 Ill. 296, the court held that a party executing a note for a plowing machine was bound to pay it to an innocent holder, although he intended to add a condition to the note after it was written and signed, and before he could do so the payee snatched it from him, and sold it to an innocent purchaser. This seems to be carrying the doctrine beyond its proper limits. The case does not appear to have been well considered. No authorities are cited either by the counsel or by the court, except the case of *Shipley v. Carroll et al.*, 45 Ill. 285, where the maker was held liable on a stolen note in the hands of an innocent purchaser. In the case of *Shipley v. Carroll*, it was intimated that if the execution of the note had been obtained by fraud it would have been void under their statute, which allows the maker of a note to set up fraud and circumvention in the execution of a note as a defense. This statute, in my judgment, is only declaratory of the common law. What greater fraud could have been practiced than to induce a party to draw a note, and before its delivery, and before a condition was added to make it complete, to snatch it and run away with it? But that was not a parallel case with the one at bar. In *Nance v. Lary*, 5 Ala. 370, the court held that where one writes his name on a blank piece of paper, of which another takes possession, without authority, and writes a promissory note above the signature, which he negotiates to a third person who is ignorant of the circumstances, the former is not liable as the maker of the note.

In *Foster v. Mackinnon*, 4 Law Rep. (English common pleas) 704, which is very much in point and seems to have been well con-

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sidered, the court held that where a defendant was induced to put his name upon the back of a bill of exchange, by the fraudulent representation of the acceptor that he was signing a guarantee, he was not liable as an indorser at the suit of a *bona fide* holder for value.

The supreme court of New York, in the case of *Whitney v. Snyder*, 2 Lans. 477, a case directly in point, held that in an action on a negotiable promissory note, bought by a purchaser thereof before maturity, in good faith and for a valuable consideration, against the maker, the latter may prove as a defense that when he signed it, it was represented to him and he believed it to be a contract entirely different in character. The court distinguished his case from a note fraudulently obtained and which the maker intended to make.

In *Gibbs v. Linabury*, 22 Mich. 479, a case precisely in point, except that was a hay-fork and this a pump, the court held that when the defendant unwittingly signs an instrument in the form of a negotiable note, relying upon false representations made to him at the time that the instrument he is signing is the mere duplicate of a contract just previously signed by him, making him an agent for the sale of a patent hay-fork, under circumstances devoid of any negligence on his part, and when fraudulent means are taken to prevent him from noticing the body of such pretended duplicate, and he delivers the same in ignorance of its true character, believing it to be the mere duplicate contract which he supposed he had signed, such instrument is to be regarded as a forgery, and cannot be enforced even in the hands of a *bona fide* purchaser.

These cases were all well considered and lay the rule down as it should be in regard to the execution of commercial paper, without in the least impugning the well-settled doctrine that no inquiry can be allowed as to the consideration of such paper, as between the maker and an innocent indorser for value.

I think, both upon reason and authority, the instruction under review ought to have been given and those in conflict with it refused.

Let the judgment be reversed and the cause remanded. The other judges concur.

NOTE.—The case of *Foster v. McKinnon*, and that of *Whitney v. Snyder*, cited in the foregoing opinion, were printed in full in the note to *Douglas v. Matting*, 4 Am. Rep. 388. *Gibbs v. Linabury*, 22 Mich. 479; also cited above, is reported 7 Am. Rep. 618.

In *Douglas v. Matting* the supreme court of Iowa decided that where a man was induced to sign his name to a promissory note, through the fraudulent representation

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of another, that it was a contract of agency, he was, nevertheless, liable to a *bona fide* purchaser for value before maturity. This decision was put upon the ground that it was culpable carelessness for the maker to sign the paper without ascertaining its contents.

In *Taylor v. Atchison*, 5 Am. Rep. 118, the supreme court of Illinois held a contrary doctrine on like facts. The defendant, the maker of the note in that case, was able to read the paper signed, though with much difficulty; but, instead of doing so, he had it read by the one seeking to perpetrate the fraud. The court held, however, that the maker was not liable to an innocent holder.

In *Walker v. Egbert*, 9 Am. Rep. 548 (29 Wis. 194), the defendant was a German, and unable to read or write English. He was induced to sign a promissory note by false and fraudulent representations, that it was a contract of a different character. The court held that he was not liable on the note in the hands of a *bona fide* holder for value before maturity. As the defendant was unable to read the paper, he was clearly not guilty of negligence in not doing so; and the case is, in this particular, identical with that of *Whitney v. Snyder*, *supra*.

The most recent decision on the question is that of the Court of Appeals of New York in *Chapman v. Ross*, 9 Alb. L. J. 229; 1 Cent. L. J. 242. That action was on a promissory note brought against the maker by a *bona fide* indorsee for value before maturity. The defendant alleged, and the proof showed that he was induced to sign the note by the fraudulent representations of the payee therein, that it was an instrument of a different character, and that he did not intend to sign a note. The defendant did not read the instrument before signing it, although there did not appear to be any physical obstacle to his doing so. The court held that this was negligence on his part, and that he was liable to a *bona fide* holder. — RMR.

McKINZIE, appellant, v. HILL.

(51 Mo. 202.)

Statute of limitations — when not suspended by war.

The courts of a county in Missouri were closed for a time in consequence of the rebellion. *Held*, that the statute of limitations did not cease to run for the time as to a promissory note made in the county.

PROCEEDINGS instituted by the plaintiff as administratrix of Alex. McKinzie, deceased, against the defendant, as administrator of William Gay, deceased, to obtain the allowance of a claim against the estate of defendant's intestate. The opinion states the case.

Nathan Bray, for appellant.

H. Brumback, for respondent.

WAGNER, J. This was a proceeding originally instituted in the probate court of Lawrence county, to obtain the allowance of a

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demand against the estate of the defendant's intestate. The defense was the statute of limitations. The demand consisted of a promissory note for two hundred dollars, dated December 31, 1858, and due one day after the date thereof. The record shows that notice was given to the administrator on the 14th day of July, 1868, that the note would be presented for allowance at the next October term of the probate court. But at that term the plaintiff did not appear, no presentation was made, and no steps were taken in the matter. A new notice was then given, that the demand would be presented for allowance at the April term, 1869, which was served on the 2d day of April in the same year, at which term the cause was submitted to the court and judgment was rendered for the defendant. On appeal to the circuit court the plaintiff offered to introduce evidence to prove that the notices were served, and that the action was commenced within two years after the granting of letters of administration on the estate of the defendant's intestate, and then offered evidence to show that Lawrence county was in the rebel lines for six months in 1861-62, and that on account of the rebellion no circuit court was held in that county from February, 1861, till May, 1862, which evidence the court excluded and the plaintiff excepted.

Plaintiff then asked for declarations of law founded on the excluded testimony which the court refused to give, and then found for the defendant, thus affirming the judgment of the probate court.

A motion for a new trial was duly filed, the reasons assigned being that the court erred in refusing the declarations of law, and that it also committed error in excluding competent testimony.

There was no error in refusing to give the instructions, for after the evidence was ruled out there was nothing on which to base them.

The only question then before us is, whether the evidence which the court rejected was proper to be admitted in the cause.

At what time the letters of administration were granted to the defendant on the estate of the maker of the note is not shown. The doctrine established by this court is, that the statute of limitations does not run in favor of an estate during the time there is no administration; that it only commences running from the grant of letters. *Polk v. Allen*, 19 Mo. 467; *McDonald v. Walton*, 2 id. 43.

But, here the offer was to prove that the claim was exhibited within two years after the granting of letters. That is the time allowed by the statute for proving up claims against an estate, but

if the demand is barred by the general provisions of the statute before it is presented, it was never intended to graft this on the statute as an extension of time.

The first notice must be wholly disregarded, as no attempt was made to proceed under it, and the second notice was not given till after ten years had gone by, and the statute therefore is a complete protection, unless we exclude the time in which it is alleged the circuit court was suspended in consequence of the rebellion.

Richardson, adm'r, v. Harrison, adm'x, 36 Mo. 96, was a case similar to this, and we there held, that proof that the civil law was suspended on account of the war, during a portion of the period, would not extend the time for presenting the claim. The court there remarked that it did not appear that the civil law was suspended for nearly a year after the statute had commenced running; nor did it appear that the plaintiff's remedy was ever suspended, for he might still have served a notice on the executrix, and that would have had the effect of saving the bar.

But it is contended that the supreme court of the United States has laid down a different doctrine. The case in which the question first arises is *Hanger v. Abbott*, 6 Wall. 532.

In that case Abbott, a citizen of New Hampshire, sued Hanger, of Arkansas, in assumpsit. The latter pleaded the statute of limitations of Arkansas, which limits such actions to three years. The former replied, setting up the fact of the rebellion, which broke out after the cause of action accrued, and closed for more than three years all lawful courts. On these facts the court decided that the time during which the courts in the lately rebellious States were closed to citizens of the loyal States, is, in suits brought by them since, to be excluded from the computation of the time fixed by statutes of limitation within which suits may be brought.

Mr. Justice CLIFFORD, as the organ of the court, delivered an elaborate opinion and placed the judgment entirely on the ground that, during the pendency of war, there is a total non-intercourse between the belligerents; that, when hostilities are commenced, all trading, negotiation and communication between the citizens of one of the countries with those of the other, without permission of the governments, is unlawful; that a citizen of one of the hostile nations would not be allowed to enforce his contracts in the courts within the territorial limits of the other.

Proclamation of blockade was made by the president on the 19th

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day of April, 1861, and on the thirteenth day of July, in the same year, congress passed a law authorizing the president to interdict all trade and intercourse between the inhabitants of the States in insurrection, and the rest of the United States. Under these circumstances the plaintiff was effectually precluded from bringing suit to assert his rights in the forum where the defendant resided. After the termination of the war, and the restoration of peace, the plaintiff had a tribunal in which to commence his action, but if the statute was to run during the time in which he was disabled, it would be a barren right. The court on this point says:

“But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close their courts, and to successfully resist the laws until the bar of the statute is complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period.”

This doctrine is approved and followed in subsequent cases. *The Protector*, 9 Wal. 687; *Levi v. Stewart*, 11 id. 244; *Stewart v. Kahn*, id. 493; *U. S. v. Wiley*, id. 508.

But the principles above announced have no application to the present case. Missouri was not one of the States that joined in the rebellion, and her courts were open. The plaintiff labored under no disability, and his demand accrued and the statute had commenced running before the alleged temporary suspension of the holding of the circuit court. Both parties were residents of the same county and within the same jurisdiction.

It was not necessary that the court should be held to enable him to pursue his remedy and avoid the bar of the statute. He might have filed his suit with the clerk of the court, and had summons issued and served, and that would have been sufficient. There is no pretense that this course was not open to him.

In my opinion, the evidence was properly excluded, and the judgment should be affirmed.

Judgment affirmed.

STATE ex rel. CIRCUIT ATTORNEY v. COUNTY COURT OF SALINE COUNTY, appellant.

(51 Mo. 302.)

Injunction — restraining unlawful acts of public corporations.

A public corporation may be restrained from doing an act not authorized by law on an information in equity by a law officer of the State, in the name of the State. WAGNER, J., dissenting.

THIS is an action brought in the name of the State by the circuit attorney of the sixth judicial circuit, against the county court of Saline county and its judges and the collector of Saline county, to restrain the county court and its officers from issuing bonds to the Missouri and Louisiana Railroad Company, or any county warrants, in payment of their subscriptions to the capital stock of that company, and from the levying and collecting any taxes for the purpose of paying such bonds or the coupons thereon or such warrants.

The petition sets forth, that on the 7th day of February, 1868, the county court of Saline county undertook to subscribe four hundred thousand dollars to the capital stock of the Louisiana and Missouri River Railroad Company; that the said railroad company was incorporated in 1859, and by the terms of its charter it was provided that "it should be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company." That the route of the railroad, designated in that act, was a route wholly on the north side of the Missouri river, and did not run through or into the county of Saline on the south side of the river. That the county court of Saline county did, on the 7th day of February, 1868, make its subscription, professing to act under the permission given by the act of 1859. That this was done without ever having submitted the matter to the voters of Saline county for their assent, and was in violation of the 14th section of the 11th article of the constitution of the State. That after the subscription was made, and on the 14th of March, 1868, the legislature passed an act purporting, by its title, to be an act amendatory of the former charter of the railroad company. That this act is void, as conflicting with the 4th section of the 8th article of the constitution, and with the 32d section of the 4th article, and that the 20th section of the act, if valid, conferred no

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authority upon the county court of Saline county to subscribe for stock. That their subscription was without any authority of law, was an usurpation of power, was at variance with the letter and spirit of the constitution, and of the laws of the State. That the county court have already issued some bonds to pay for the subscription, and threaten to issue others. That the county court have assessed and levied taxes for the purpose of paying the bonds and interest, and have included the tax so assessed in the general county taxes against the individual tax payers, so that it cannot be separated, and that the whole scheme was a fraud upon the tax payers. That if any remedy existed at all to the tax payers it is by a multiplicity of suits by each tax payer for himself. That the tax-payer cannot tell what part of the tax assessed against him is illegal; praying that the county court and its officers be restrained from issuing any more bonds or warrants for that purpose, and that the officers and collector be restrained from levying, assessing or collecting taxes for the payment of such bonds or warrants, or the interest thereon.

The defendants answered, denying the illegality of their action in the matter of the issue of these bonds, claiming that they had full power to make the subscription, under the original charter of the railroad. That the route, as designated in that charter, was not wholly or exclusively on the north side of the Missouri river, but that the directors had the authority to locate the route from Louisiana to any point in the State of Missouri, whether on the north or south side of the river; and that before the subscription the directors had located it from Louisiana to Kansas City. That Saline county was on the route of the road thus located.

They deny that the act of the 24th of March, 1868, called the amendatory act, is void or in conflict with the constitution of the State, or the subscription illegal or the bonds void.

The case was heard upon the petition and answer without further proof, and the court made the preliminary injunction perpetual, and the defendant appealed.

Sharp & Broadhead and *Thomas J. C. Flagg*, for appellants.

Warner, circuit attorney, and *W. B. Napton*, for respondents.

SHEPLEY, Special Judge. The question that lies at the threshold of this case, is whether such a proceeding as this is, can be maintained by the State.

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It is asserted by the plaintiff that it is competent for the State, through its authorized officers, to institute this proceeding to restrain public corporations from doing acts in violation of the constitution and laws of the State.

On the part of the defendants, it is contended that the attorney-general or the circuit attorneys, in their respective districts, have no authority by statute to institute such a proceeding in the name of the State. That, if such power exists at all, it exists by virtue of the common law, and that by the common law such interference on the part of the State is confined to two classes of cases — one being that of public nuisances, and the other being the administration of charitable trusts.

The question is obviously one of great importance, though, as will be seen hereafter, it has been considered and decided in the courts of other States, it has received the most elaborate examination in the courts of the State of New York, and especially in the case of *Davis & Palmer v. The Mayor of New York et al.*, 2 Duer, 663, and in the case of *The People v. Miner*, 2 Lana. 396.

The case in 2 Duer, 663, was brought by two tax payers against the mayor and others to restrain the construction of a street railroad upon Broadway, for the doing and operating of which the municipal authorities of the city had given authority to the individual defendants under their general power over the streets of the city. The court decided that it was not a public nuisance, but that when any act of a municipal corporation is sought to be restrained or annulled as a violation of its charter, or breach of trust, or an excess of power, the attorney-general was a necessary party, either prosecuting alone or in conjunction with or upon the relation of individual corporators, and required that the attorney-general should be made a party to the proceeding. After examination Judge DUER arrives at the conclusion that at common law the attorney-general in England could institute proceedings to restrain public and private corporations from exercising powers not granted and from the abuse of those granted; and, to sustain his position, cites *Attorney-General v. Forbes*, 2 M. & C. 129; *Attorney-General v. Aspinall*, id. 613; S. C., 1 Keen, 513; *Attorney-General v. Corporation of Poole*, 4 M. & C. 17; S. C., 2 Keene, 190; *Attorney-General v. Mayor of Liverpool*, 1 M. & C. 171; *Spencer v. London and Birmingham Ry. Co.*, 8 Sim. 193; *Earl of Milltown v. Stewart*, id. 373; *Attorney-General v. Wilson*, 9 id. 30, 36, 56; *Attorney-General v. Corporation of Litch-*

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field, 13 id. 547; *Attorney-General v. Corporation of Norwich*, 16 id. 228; 1 Bligh (N. R.), 312.

In the subsequent case of the people, at the relation of the *Attorney-General v. Miner*, 2 Lans. 396, which was a suit brought to restrain the commissioners of the town of Augusta from subscribing to the capital stock of a railroad, the supreme court of the fifth district held that the action could not be maintained. Judge MULLEN, in delivering the opinion of the court in that case, while conceding that the decision of the court in the case in 2 Duer, 863, was correct, yet denies that the conclusions reached by Judge DUER in his opinion in that case as to the power of the attorney-general in England, are maintainable or warranted by the decisions he quotes. He undertakes to define and classify all the powers possessed by the attorney-general in England, the only two of which, as stated by him, relating to this matter, are by writ of *quo warranto* to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter and annul the existence of a corporation for violation of its charter, or omitting to exercise its corporate powers, and by *information to chancery* to enforce trusts and to prevent public nuisances and the abuse of trust powers.

He examines all the cases cited by Judge DUER (except the case in Bligh N. Reports), and undertakes to show that they are all cases of an abuse of trust or a misapplication of trust funds, and are maintainable under the general equitable authority of the court over trusts.

But if that be conceded, how does it show that Judge DUER is mistaken? Every misapplication of public funds and every abuse of power by public bodies is in one sense an abuse of a trust. These trusts are certainly not charitable trusts, and it is not contended that the attorney-general has power to institute such proceedings over all trusts, private as well as public. How, then, had the attorney-general a right to interfere here about these so-called trusts? Not certainly because they were trusts, but because they were trusts in which the public were concerned.

The case which Judge MULLEN did not examine, not being able to find it, the case of the *Attorney-General v. The City of Dublin*, 1 Bligh N. R. 312, incorrectly quoted by Judge DUER as in 2 Bligh N. R.

It so happens that in that case, which was an appeal to the house of lords, this question distinctly arose, and the objection was made

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that it was not maintainable on the ground that it involved no matter of trust. The lord chancellor and Lord REDESDALE, who both gave opinions in maintaining the jurisdiction, refused to place the jurisdiction on the ground of a trust, but placed it upon the general ground that the State had the right to prevent the doing of illegal acts by public and private corporations. Lord ELDON referred to the case of the *Attorney-General v. Browne*, 1 Swanst. 265, as showing that the jurisdiction was not there placed upon the ground of a trust. But more recent cases in England have removed any obscurity, if any there be, as to the ground of the jurisdiction maintained there.

In case of the *Attorney-General v. The Great Northern Railway Company*, 1 Dru. & S. 154, was the case of a bill brought to restrain a railway company from buying and selling coal, and the jurisdiction was there upheld, and the vice-chancellor placed the decision on the ground that though in that case any shareholder might file a bill, yet that in the matter of the abuse of corporate powers, or the exercise of powers not granted, the public sustained an injury, and it was competent for the attorney-general, *ex officio*, or on relation to file an information to restrain it.

The case of the *Attorney-General v. The Mid. Kent Railway Company*, L. R., 3 Ch. 100, which was an appeal in chancery, an information was brought by the attorney-general to compel the railroad company to make certain slopes of a certain gradient on the line of their road, in conformity with the requirements of its charter, and it was objected that there was no jurisdiction. Both Lord CARNES and Sir JOHN HOLT gave opinions sustaining the jurisdiction, placing it upon the broad ground before mentioned.

In the case of *Stockport District Water-works v. Manchester*, 9 Jur. N. S. 266, which arose on a contract between the city and an aqueduct company to carry water beyond the limits which the city was authorized by law to supply, Lord WESTBURY said he would not hesitate to act upon the information of the attorney-general.

The jurisdiction has been asserted in the recent case of *Hare v London & N. W. Railway Co.*, 2 Johns. and H. 111; *Liverpool v. Chorley Water-works Co.*, 2 DeGex, Man. & G. 852-860; *Ware v. Regent's Canal Co.*, 3 DeGex & Jones, 212-228.

In a recent case — *The Attorney-General v. The Commissioners of West Hartlepool*, Law R., 10 Eq. 152 (1870) — which was a case brought by the attorney-general at the relation of certain rate-pay.

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ers against the commissioners to restrain them from diverting the funds of the town to the procurement of the parliamentary legislation, the jurisdiction was sustained and the relief granted. Here was simply an abuse of corporate powers which was sought to be restrained.

In none of these decisions is there the slightest hesitation in placing the jurisdiction upon the broad ground, that the State had the right in this form of proceeding to restrain all corporations, public and private, from the abuse of powers granted, or from exercising those not granted.

The decision arrived at in 2 Duer, and the principle there maintained, has been approved by the court of appeals in the State of New York in the cases of *Doolittle v. The Supervisors of Broome County*, 18 N. Y. 162, and in *Roosevelt v. Draper*, 23 id. 324, as also by the supreme court of the first district in *Roosevelt v. Draper*, 16 How. Pr. 137; by the supreme court of same district in case of *People v. Lowber*, 7 Abb. Pr. 158, and in *People v. Mayor of New York*, 10 id. 144; by the supreme court of the third district in *People v. Mayor of New York*, 32 Barb. 102, and the supreme court of Pennsylvania in 50 Penn. St. 100, as also by the supreme court of the State of Illinois in the case of *Board of Supervisors v. Keady and others*, 34 Ill. 296.

The question was presented in Massachusetts in the case of *The Attorney-General v. Salem*, 103 Mass. 140, and it was decided that, if, in Massachusetts, the jurisdiction existed, no case was made for its exercise; and also that, under the limited equity jurisdiction given in Massachusetts by their statutes, it probably was not conferred upon the attorney-general to institute such a suit.

If the case of *The People v. Miner*, 2 Lans. 397, be supposed to decide that the State cannot institute such a suit as the present, then it seems to me that it cannot be sustained. But I do not so understand the decision in that case, though it is difficult to say just how far the court goes in this matter of jurisdiction.

That case was to restrain a town from subscribing to the stock of a railroad company, as being beyond the powers granted in their charter, and the court, while stating at p. 407, "that it does not mean to be understood as denying the right of the attorney-general to apply to restrain corporations from exercising franchises not granted," decides the case against the right claimed in that particular case, upon the ground that the defendants were expressly authorized to

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borrow money, issue bonds, and subscribe for stock, and the only question was whether they had properly exercised the powers expressly granted.

But here there is no franchise, privilege or power, either general or special, granted to this county court to subscribe for any stock whatever, but if conferred at all, it is a legislative authority to subscribe to the stock of a certain railroad company, and, it is alleged, under certain limitations not complied with.

It was urged on the argument, with great force, that such a power on the part of the State was a very dangerous one ; that there was no necessity for its exercise, as the persons whose rights were affected were perfectly competent to protect their rights, and the law afforded them a complete and adequate remedy.

It is conceded that a corrupt officer, in refusing to institute any proceeding when there was a clear violation of law or constitution, or in putting it in motion when there was no valid ground for its exercise, might use his office oppressively ; but this is no more than saying that any person or officer, to whom large powers are confided, may oppress. The remedy lies in seeing that honest and incorruptible men are put into public places, and especially so in those connected with the administration of justice.

But there is another consideration that is entitled certainly to as much weight as that growing out of a possible oppression, and that is the necessity that now exists of providing ample and efficient means for restraining public corporations from misusing powers granted, and usurping powers not granted.

To the argument that in this, and similar cases, the tax payer has a complete and efficient remedy for the alleged violation of the law and the constitution, it is to be said that it is no argument against the right of the State to prevent public corporations from violating the law, that private individuals have the same right when their private interests are affected. The State has interests apart from and, it may be, antagonistic to those of the individual corporator. It may be to the interest of every individual corporator that the corporation should exercise powers not granted and even prohibited by the constitution, but it is the right and the duty of the State to see that these public corporations do not willfully violate the constitution or the law. If the redress is to be confined wholly to legislation, then it might be wholly ineffectual, especially in those States where the legislature meets but in every two years.

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It is worth while briefly to examine what remedy the tax payer has in such case as this, if the subscription be illegal and void, according to the decisions of this court.

It has been decided that certiorari will not lie (*State v. Saline Co.*, 45 Mo. 52); nor prohibition (*Vitt v. Owens*, 42 id. 512); nor will injunction lie at the suit of a tax payer, to enjoin the assessment, levy or collection of a tax, however illegal or void. *Tayre v. Tompkins*, 23 id. 443; *Page v. City of St. Louis*, 20 id. 136; *City of St. Louis v. Goode*, 21 id. 216; *Deane v. Todd*, 22 id. 90; *Barrow v. Davis*, 46 id. 394; *Leslie v. City of St. Louis*, 47 id. 474; *Steines v. Franklin Co.*, 48 id. 175; *McLike v. Pew*, id. 525.

If a levy has been made for an illegal tax, if the warrant contains any part of the tax which is legal, or the property is liable to taxation in any form, the tax warrant protects the officer, and no recovery can be had. *Glasgow v. Rouse*, 43 Mo. 479; *St. Louis Building, etc., Association v. Lightner*, 47 id. 393, 462; *State to use of Pacific R. R. Co. v. Dulle et al.*, 48 id. 282.

The remedy as to illegal taxation seems to be confined to this: That if the tax payer has real estate, and the collector is not able to make it out of his personal property, he can, when his real estate is about to be sold, enjoin the sale. *Lockwood v. City of St. Louis*, 24 Mo. 20; *Fowler v. City of St. Joseph*, 37 id. 228. And it seems to be held in the case of *Steines v. Franklin Co. et al.*, 48 id. 176, that though the tax payer has not the right to enjoin the assessment, levy or collection of an illegal tax, he can maintain a bill to declare the contract void, to cancel the bonds, and restrain their payment, sale and transfer.

But in case he must give a bond and incur a responsibility, often to the amount of tens of thousands of dollars, while he is only interested to the amount of hundreds, at most.

It is possible, too, for the corporation, conscious that they are about to do an illegal act, to take such steps that the act is done, and the bonds issued are beyond the jurisdiction of the court, so that it is very difficult, if not impossible, for the tax payer to obtain redress.

I cannot think that there is furnished any effectual protection to the tax payer from being compelled to pay an illegal tax, or to the State for a violation of the constitution or the law.

But it is further urged that the supreme court of the State has already decided against the jurisdiction here claimed, in the case of

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the State at the relation of Connelly et al. v. The County Court of Platte County and the Parkville and Grand River Railroad Co., 32 Mo. 496. This was a proceeding brought in the name of the State, to restrain the county from issuing bonds to the railroad company as not authorized by law, brought, not by the attorney-general or the circuit attorney, or at their instance, but by some citizens of the State, who undertook to use the name of the State without authority in their suit; and beyond question the case was rightly decided. The question arose upon a demurrer to the petition, and one of the grounds for sustaining the demurrer is thus stated: "There is nothing in the petition which shows or pretends to show that the State of Missouri has any interest, legal or equitable, in the subject-matter of the controversy, and the suit was improperly brought and cannot be maintained in the name of the State," and this is all that is said on the subject in the opinion. That the State had no pecuniary interest may perhaps be conceded, but the question was not raised or considered whether the State, acting through its legal officers, cannot restrain its public corporations from violating the constitution and the laws.

It seems to me that, both on principle and authority, this proceeding is maintainable; and that while, in the case of private corporations, the courts in this country will sustain the conclusions arrived at in *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, in *Attorney-General v. Salem*, 103 Mass. 138, and *Attorney-General v. Tudor Ice Co.*, 104 id. 239, that the writ of *quo warranto* affords an ample and efficient remedy for any violation of its charter, or misuse or abuse of its powers, and therefore that this form of proceeding will not lie, the power of the State, through its proper legal officers, to restrain public corporations from a violation of the law will be sustained.

In the case of the *Attorney-General v. Salem*, 103 Mass. 138, the court held that the writ of *quo warranto* did not lie against a public corporation, and unless we are prepared to admit that the State had no other remedy for the willful and flagrant violation of laws by a public corporation, than by legislation, then the law which appears for the first time in the revision of 1865, and is efficient both for the State and the individual, gives the power to the State to use the remedy by injunction, when it provides (2 Wag. Stat., 1032) that "the remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or personal property is threatened, and to

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prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages."

The remainder of the decision is devoted to a consideration of local statutes.

WAGNER, J., dissented.

Judgment affirmed.

THURSTON, appellant, v. CITY OF ST. JOSEPH.

(51 Mo. 510.)

Municipal corporations — defective sewer. Constitutional law

The defendants—a municipal corporation—built a sewer, which was defective, and plaintiff's land was flooded and injured thereby. *Held*, that this was a taking of plaintiff's property within the meaning of the constitution, for which compensation was due, and that defendants were liable irrespective of negligence.

ACTION brought by the plaintiff against the city to recover damages for overflowing her premises in consequence of defective and insufficient sewerage. In the petition it is alleged that defendant, by its agents, employees and servants, built a new sewer to connect with an old one, and so negligently, unskillfully and carelessly joined the two together; and by reason of one of the sewers being insufficient to carry off the water from the other, and by the accumulation and stoppage of sticks and small timber the water burst out and did the damage. At the trial the court refused to allow the plaintiff to introduce any evidence, on the ground that the petition did not state facts constituting any cause of action against the defendant, and the plaintiff thereupon took a nonsuit.

Everett & Reed, for appellant.

Chandler & Sherman, for respondent.

ADAMS, J. The main point presented by this record is the liability of a municipal corporation for damages resulting to a lot holder from improvements made under authority conferred by the city charter.

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What are the rights of a lot holder in reference to the adjacent streets and alleys? The owner in fee of a tract of land may have it surveyed into town lots, streets and alleys; and without selling any of the lots, or acknowledging the plat, he may destroy the survey and vacate the streets and alleys. But if he convey away any of the lots, the right to the free use of the adjacent streets will pass to the grantees as appurtenant to their lots; and such grantees will not only have a servitude or easement in the adjacent streets and alleys as appurtenant to the lots, but the conveyance itself would be a dedication of the streets and alleys to the public as well as to the private use of the lots. This would be the result without any statutory dedication by acknowledging and filing the plat with the county recorder. The effect of a statutory dedication, however, is precisely the same. It vests in the adjacent lot holder the right to the use of the streets as appurtenant to his lot, and this easement is as much property as the lot itself. It is a property interest, independent of the right of the public to use and improve the streets as public highways, and the lot holder is as much entitled to protection in the enjoyment of this appurtenant easement as he is in the enjoyment of the lot itself. Hence, whatever injures or destroys this easement, is to that extent a damage to the lot. So if in grading a street it be raised so high as to throw the surface water back upon the lot, or prevent a free access to the street; or if the street be excavated so low as to render the easement of no use to the lot, the lot holder is thereby damaged to the extent of the loss of such easement. The question here is whether the lot holder has any remedy at all for such injuries. The case under consideration is a sewer, which the city no doubt had the power to construct. But the gravamen of the complaint is that through negligence in the construction of this sewer water was thrown on the lot of the plaintiff and thereby injured her property. If we are still to follow the rule as laid down in the *City of St. Louis v. Gurno*, 12 Mo. 414, and the subsequent cases of *Taylor v. St. Louis*, 14 id. 20, and *Hoffman v. St. Louis*, 15 id. 651, we must deny all remedy for such injuries. In the cases referred to this court followed the lead of the king's bench in *The Governor, etc., v. Meredith and others*, 4 T. R. (D. & E.) 794. The doctrines laid down in that case by Lord KENYON and others, in my judgment, are not applicable to America. The improvements which caused the injury were made under an act of parliament, which authorized the commissioners to allow damages,

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but the court seemed to place their decision on the ground that parliament was omnipotent, and on this ground alone denied any remedy to the injured party. The court held that as the improvement was for public convenience, the maxim "*salus populi suprema lex esto*" applied, and that private rights must yield to public convenience. The same line of reasoning was maintained by the learned judge who determined the opinion in the leading case of *St. Louis v. Gurno*. In adopting the rule laid down by the king's bench, he said: "It has long since passed into a maxim, that the safety of the people is the supreme law, and, as a corollary from this ancient truth, that individual convenience must yield to the public good."

Conceding the maxim to be just, the corollary in the comprehensive sense used in England is a *non sequitur* as applicable to the American States. Our governments are republican, and are instituted for the protection of the people in their individual rights of persons and property. These rights cannot be invaded as a mere matter of convenience to the public. It is only where the safety of the people is involved that individual rights can be destroyed to protect the community from impending danger. Thus in great conflagrations private houses may be torn down or destroyed to stop the fire, and in like manner property of any kind may be destroyed to prevent the spread of contagious diseases.

The destruction of private property in such cases is an overruling necessity, and is only a proper application of the right of self-defense, which the people as well as individuals may resort to for their own safety. It must, however, be a supreme necessity which authorizes the destruction of private property for the safety of the people. When such necessity in fact exists the maxim "*salus populi suprema lex*" will apply, and the party whose property is destroyed is without remedy, his loss being "*damnum absque injuria*." But this maxim ought not to be applied to mere matters of public convenience. The improvements of streets, drainage, sewers, etc., are in almost every instance mere matters of public convenience which the city authorities in their discretion are allowed by law to make. They are not matters of supreme necessity involving the safety of the people, and hence this plea is not applicable to the case under consideration.

The city authorities are allowed to establish sewers and to alter them from time to time, and they may establish the grade of streets, and may from time to time alter and re-establish such grades.

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These powers are not exhausted by their exercise, but are continuing powers. See *Hoffman v. St. Louis*, 15 Mo. 651; *Gosler v. Georgetown*, 6 Wheat. (U. S.) 593. But can such powers be exercised to the injury of private lot holders without paying a just compensation? It is said that lot holders make their purchases and build their houses with a knowledge of these powers in the city authorities, and must therefore take the consequences. If they build to an established grade, or before any grade is fixed, in either case, under this rule, they must do so at their peril. A lot holder of large fortune may invest it all in a fine edifice, built precisely to an established grade, and the city authorities may, as soon as his house is completed, alter the grade by lowering it a hundred feet, or raising it the same number of feet, and thus entirely destroy the appurtenant easement and render his house and lot utterly valueless. After thus being served ought the courts to be closed against the appeals of the injured lot holder for relief? Is it any consolation to him to hear a lecture read about the necessity of further legislation, and to be told that his loss is "*damnum absque injuria*;" that he ought to have a remedy, but the political power of the State must be looked to and not the courts; that the granting of such immense power to a city, thus to destroy his property, ought to have been so guarded as to have allowed a just compensation for such injury.

This line of argument and advice was tendered as a justification for refusing relief in *St. Louis v. Gurno*, and was followed without inquiry in the subsequent cases of *Taylor v. St. Louis* and *Hoffman v. St. Louis, ubi supra*. The same course of reasoning was pursued by the courts of New York, Pennsylvania and Massachusetts, relied on as authorities in *St. Louis v. Gurno*. See *Wilson v. City of New York*, 1 Denio, 595; 4 Serg. & R. 514; *Green v. Borough of Reading*, 9 Watts, 382; *Callender v. Marsh*, 1 Pick. 418. The same thing may be said in regard to all the American cases maintaining the doctrines laid down in *St. Louis v. Gurno*.

It is a notable fact that most of the American courts have blindly followed the rulings of the British court in the leading case of the *Governor, etc., v. Meredith and others*, 4 T. R. 794. In doing so, they have entirely ignored some of the plainest and most imperative provisions of the bill of rights contained in the constitutions of the several States. Section 7 of article 13 of the old constitution of Missouri reads as follows: "That courts of justice ought to be open to every person, and a certain remedy afforded for every injury to per-

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son, property or character; and that right and justice ought to be administered without sale, denial or delay; and that no private property ought to be taken, or applied to public use without just compensation." The provisions of this section were incorporated into the new constitution, and will be found to be divided into two sections, viz.: sections 15 and 16 of article 1. Section 15 requires courts to be open, and a remedy afforded for every injury, etc., and section 16 declares that private property shall not be taken for public use, without just compensation. By these provisions of our constitution a *certain remedy for every injury to property* is guaranteed to the citizen, and this guaranty is as sacred and imperative as the one which protects him in the enjoyment of his private property from appropriations to public use without a just compensation.

Therefore, when the legislature confers on cities the right to take private property for public use, or the authority to grade streets and make sewers, etc., the power must be taken and exercised subject to these constitutional guarantees. So that when cities, in the exercise of their undoubted powers in making improvements, injure lot holders, they do so subject to the rights of the lot holders to sue them for such injuries. The legislature has no power to violate these plain provisions of the constitution; and the only proper way to construe such laws is to give them full force, allowing cities to exercise the powers conferred to the fullest extent, subject, however, to the rights of a citizen to a just compensation for all injuries to his property. When such laws do not in terms provide a remedy, it is implied and may be resorted to under these provisions of the constitution.

These constitutional provisions may be looked to as entering into, and forming a part of all such laws, otherwise the courts would have to declare them unconstitutional and void. In *Lackland v. The North Mo. R. R. Co.*, 31 Mo. 180, this court allowed a lot holder to recover damages against the railroad company, for obstructions placed in a street under authority assumed to be given by the city of St. Charles to the railroad company. The court denied the power of the city under its charter to allow the railroad company to appropriate the street as indicated; but did not wish to be understood as saying that the legislature could not grant such power to the corporation. I maintain that the legislature may grant power to cities to improve the streets, or to appropriate them, to the injury of the lot holder. But when such power is exercised to the injury of the

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lot holder, he must have an adequate remedy. The city may exercise the power, but must answer for the consequences to the lot holder. The true ground of his right to recover is his appurtenant easement or property interest in the street itself.

Judge NAPTON, in *Lackland v. The North Mo. R. R. Co.*, *supra*, predicated the plaintiff's right of recovery on this very ground. The learned judge speaking for the court said, "as to the ownership of the soil of the street, the question is of no practical importance. The right of the owner of a lot in a town to the use of the adjoining street is as much property as the lot itself, and the legislature can no more deprive a man of one than the other without compensation." This language enunciates the true doctrine, and is in direct conflict with the rulings of the same learned judge in *St. Louis v. Gurno*, and in effect overrules the principles laid down in that case.

In my opinion the court erred in excluding the evidence offered by the plaintiff. I think the judgment ought to be reversed and the cause remanded. Judge SHERWOOD concurs. Judge EWING also concurs in the result. Judge WAGNER files a separate opinion. Judge VOBIES having been of counsel didn't sit.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

FRANKLIN FIRE INSURANCE Co., appellants, v. CHICAGO ICE Co

(28 Md. 112.)

Fire insurance—conditions in policy—waiver—builder's risk—ordinary repairs—insurable interest.

A policy of insurance against fire contained this clause: "Nothing but a distinct specific agreement, clearly expressed and indorsed on the policy, shall operate as a waiver of any printed or written condition therein." *Held*, not to refer to stipulations in the policy as to notice and proofs of loss, and that the failure on the part of the insurer to promptly object to the form and sufficiency of such notice and proofs of loss amounted to a waiver of such stipulations.

A policy of insurance against fire on an ice-house contained a condition entitled "Builder's risk," that "the working of carpenters, roofers," etc., "in building, altering or repairing the premises named in the policy, without permission indorsed in writing on the policy, should vitiate it." The assured, in an action on the policy, testified that "the ice-house was nearly as good as new for the reason that he always kept a crew of men and a carpenter or two about the building the year round, and was constantly making repairs and keeping the building in thorough condition." *Held*, that the fact did not vitiate the policy.

Proof that the insured was in possession of the premises, claiming and occupying it as owner, is, in the absence of evidence to the contrary, *prima facie* evidence of title and of an insurable interest.

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ACTION on a policy of insurance against fire, issued by appellants, a Maryland corporation, on plaintiff's ice-house, situated in Illinois, to extend from 10th November, 1868, for one year. The building was burned August 11, 1869. Notice of the loss was forwarded on the same day to the appellants' agents in Chicago, through whom the insurance was effected, and was by them forwarded to appellants. The policy contained this condition:

“X. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what insurance has been made on the same property; giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured, and their interest therein; in what general manner the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated. They shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds most contiguous to the place of the fire, and not concerned in the loss as creditor or otherwise, not related to the assured, stating that he has examined the circumstances attending the fire, loss or damage alleged, and that he is acquainted with the character and circumstances of the assured, and that he verily believes that he, she or they have, by misfortune and without fraud or evil practice, sustained loss and damage, on the subject insured, to the amount which such magistrate, notary public, or commissioner of deeds may certify.” * * *

The proof of loss was promptly made out and forwarded, but there was no certificate attached of the nearest magistrate or notary public, as required in the above condition. No notice of any objection to the proofs furnished was made till the last of December, 1869, and then the grounds of the objection were not specified.

On the back of the policy was printed the following memorandum:

Builder's Risk. — The working of carpenters, roofers, tin-smiths, gas-fitters, plumbers or other mechanics, in building, alter-

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ing or repairing the premises named in this policy, will vitiate the same, unless permission for such work be indorsed in writing hereon.

Exception: The plaintiff offered three prayers, the second and third of which the court refused; the first, as follows, it granted:

1st. That if the jury shall find from the evidence that the plaintiff furnished to the agent of the defendant, in Chicago, the preliminary proofs of loss offered in evidence, and that said proofs were forwarded by said agent to the defendant, and received by the defendant on the 25th of September, 1869, and that the defendant retained said proofs of loss, and made to the plaintiff or its agents no objections thereto, nor any objection to the absence of a certificate, as required by the 10th condition of the policy, up to the time when Mr. White, president of the defendant, had the conversation with the witness Smith, testified to by said Smith in the month of December, 1869, should the jury find such conversation. And if they further find that in said conversation the said president of the defendant refused to pay the loss under said policy, upon grounds other than the defects of said proofs of loss, or the absence of said certificate, or both, and that at the time of so refusing to pay, the said president of the defendant made to said Smith no objection to said proofs of loss, or to the absence of said certificate, then the defendant cannot now object to the sufficiency of said proofs, or the absence of said certificate, notwithstanding the jury may find that the witness White wrote the letters of December 28, 1869, and January 3, 1870, under the circumstances offered in evidence.

The defendant offered the following prayers:

1st. That if the jury believe the statement of the witness, James P. Smith, Jr., the president and superintendent of the plaintiff, in his deposition contained, that he kept a crew of workmen and a carpenter or two about the building in controversy the year round, and was constantly making repairs and keeping the building in thorough condition, the policy was vitiated by reason of the facts so stated under the memorandum printed on the back of said policy, and headed "Builders' Risk," and the verdict must be for the defendant.

2d. That the preliminary proof offered in evidence by the plaintiff, as having been furnished to the defendant prior to the institu-

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tion of this action, is not legally sufficient to entitle the plaintiff to recover, and it being admitted that the president of the defendant, acting for it, addressed to the attorneys of the plaintiff and sent to them, on or about the 3d of January, 1870, the letter of that date, which is in evidence, the verdict of the jury must be for the defendant.

3d. That the plaintiff was bound to disclose and make known to the defendant, before or at the time of the delivery of the policy in suit, every fact material to the risk ; and if the jury shall find that the plaintiff failed or omitted so to disclose and make known to the defendant any fact whatever, material to the risk, the jury must find for the defendant. Even although the jury should further find that Campbell, Whitman & Wallace, of Chicago, were at that time agents of the defendant, to receive and forward applications for insurance, and that they were referred by the plaintiff to L. N. Moore & Co., of Chicago, and took the form of the policy or application from one of the forms of said L. N. Moore & Co., without any representation on the part of the plaintiff as stated by the witness Wallace. This prayer was refused as offered, but granted with the following modification :

But in considering the proposition put to them in this prayer, the jury are to take into consideration that the defendant, in making insurance upon an-ice house like that mentioned in the evidence and devoted to the uses therein mentioned, is presumed to know and to have contemplated all the casualties and incidents to which the subject might be properly liable as such ice-house, devoted to such uses.

4th. That Campbell, Whitman & Wallace, of Chicago, were capable of acting in law and fact as the agents of the plaintiff, in obtaining insurance from the defendant, notwithstanding they were at the same time agents of the defendant to procure business for it. And if the jury shall find that the plaintiff did so make the said firm its agents in this case, the plaintiff is as much bound by their acts done in the cause of such agency, as if they had not been defendant's agents at the same time.

5th. That the defendant is not bound by any acts of parties in Chicago, purporting to be its agents, except to the extent to which the jury shall find that they were authorized by the defendant to act for it, prior to the acts done, or at the time thereof, and not subsequently thereto ; [*unless they shall find that after the said acts, and*

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with full knowledge thereof, the defendant ratified and confirmed them.] And the jury, in determining upon the existence and extent of any such agency, must be governed by their own conclusions from the evidence, and not by the declarations or pretensions of parties claiming to be agents of the defendants, and to act in its name, although the testimony of such parties, as witnesses, may be regarded for that purpose along with its other evidence in the case. (Refused as offered but granted with this modification:) Unless they shall find, that after the said acts, and with full knowledge thereof, the defendant ratified and confirmed them.

6th. That if, during the period embraced in the policy, the premises in question were so occupied or used as to increase the risk, or if the risk, during the said period, was increased by any means whatever within the control of the assured, the policy is void, and the plaintiff is not entitled to recover.

7th. That if the jury find from the evidence, that the application which the plaintiff made or authorized to be made to the defendant for the insurance in controversy, omitted or concealed any fact in the description of the premises, material to the risk, then the plaintiff cannot recover. The sixth and seventh prayers were refused as offered, but granted with the modification :

But in considering these prayers, the jury will take into consideration the nature and use of the property as described in the evidence.

8th. That the plaintiff is bound by the representation as to contributing insurance contained in its application, and if that representation was untrue, the policy is void, and the plaintiff is not entitled to recover.

9th. That even if the plaintiff should, under any instruction of the court, be entitled to a verdict, it can only recover upon the basis of contribution stated in the application.

10th. That there is no legal or competent evidence in this cause to show that the plaintiff in this case had any legal insurable interest in the property mentioned in this cause as destroyed by fire, either at the time of the making of said policy or at the time of its destruction by fire, as testified to in this cause, and therefore the plaintiff is not entitled to recover.

11th. That the preliminary proofs shown by the evidence to have been furnished to the defendant by the plaintiff, are in themselves insufficient under the policy, and their verdict must consequently be

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for the defendant, unless they find the facts to be true which are assumed as the basis of the plaintiff's first prayer granted by the court. And by the words "preliminary proofs," the defendant means to cover the certificate of a magistrate, notary public or commissioner, required by the tenth condition of the policy.

The defendant, by its counsel, objected to the first prayer of the plaintiff, because the evidence in the case was insufficient to support the proposition of law therein asserted, even if such proposition were law upon the hypothesis of facts that it assumed, which was denied.

The court, DOBBIN, J., rejected the defendant's first, second, third, fifth, sixth, seventh, eighth, ninth and tenth prayers as offered, but granted the third, fifth, sixth and seventh with modifications, and granted as offered its fourth and eleventh.

To the granting of the plaintiff's first prayer, and to the refusal of the court to grant the defendant's first, second, third, fifth, sixth, seventh, eighth, ninth and tenth prayers as offered, the defendant excepted; and the verdict and judgment being for the plaintiff for \$2,348.78, etc., the defendant appealed.

R. J. Bouldin and John Carson, for appellant.

W. A. Fisher and Charles Marshall, for appellee.

BARTOL, C. J. This is an action of covenant on a policy of insurance, issued by the appellant to the appellee, "on their one-story frame ice-house, situate, detached, on the line of the Chicago and N. W. R. R., at Chrystal Lake, McHenry county, Illinois."

No question arises upon the pleadings, all errors therein having been waived by agreement.

The first ground of defense relied on by the appellant, was the failure of the appellee to furnish the preliminary proof of loss, in manner and form as required by the tenth condition of the policy. The fire occurred on the morning of the 11th of August, 1869, and on the same day, notice thereof was given to the agents of the appellant, who on the same day notified the appellant. Proofs of loss were made up and transmitted to the appellant within a reasonable time, but it is objected that they were defective and insufficient.

The appellee on the other hand contended that the appellant, by its conduct and proceeding, after it had been notified of the fire, and

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received the proofs of loss, had waived all objection thereto, and was precluded from objecting to their sufficiency.

By the first prayer of the appellee (which was granted) the jury were instructed that if they should find from the evidence the facts therein enumerated, the appellant could not now object to the sufficiency of the proofs of loss, or to the absence of a certificate as required by the tenth condition of the policy.

Distinct objection to this prayer was made in the court below, on the ground of the want of evidence to support it; and the same objection is urged in this court by the appellant; not because there was no evidence tending to prove the facts enumerated in the prayer, but because there was no testimony in the cause of an *express waiver*, as required by the eighth condition of the policy; without which, it is argued, the obligation to furnish preliminary proof, in accordance with the tenth condition of the policy, could not be released; and that an implied waiver would not be sufficient, and could not be shown in the face of the eighth condition.

Apart from the terms contained in the last clause of the eighth condition of the policy, there can be no doubt that the facts stated in the appellee's first prayer, if believed by the jury, would amount to a waiver of the defects in the preliminary proofs, and preclude the appellant from objecting to their sufficiency. *Allegre v. Ins Co.*, 6 H. & W. 412, 413; *Edwards v. The Baltimore Fire Ins. Co.*, 3 Gill; *Franklin Fire Ins. Co. v. Coates & Glenn*, 14 Md. 294, 295; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 403, 404.

These decisions sufficiently show the principles which govern in ordinary cases, arising under policies of insurance, containing stipulations with regard to the preliminary proofs of loss to be furnished by the assured.

The difficulty in the present case grows out of the terms of the eighth condition in the policy, which is in these words: "Should the assured, in making the application for insurance, submit a survey, plan or description of the property herein insured, upon which the insurance is effected, such application, survey, plan or description shall be considered a part of this contract and a warranty by the assured. And any misrepresentation whatsoever, whether in written application or otherwise, or any omission to disclose and make known every fact material to this risk, will vitiate this policy. Nothing but a distinct, specific agreement, clearly expressed, and

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indorsed on this policy, shall operate as a waiver of any printed or written condition, warranty or restriction therein."

The effect of a provision of this kind, in a policy of an insurance, was considered by the supreme court of Massachusetts. *Blake v. Exchange Mutual Ins. Co.*, 12 Gray, 265. The language of the very able Judge who gave the opinion of the court is so apposite to this case, that we quote it at length: "How far the provisions as to the form of the notice and proofs of loss, after a valid contract has been made and a loss taken place under it, can be regarded as conditions of the contract itself, it is not necessary to determine, nor whether their being classed under the designation of conditions of insurance could change the nature and purpose of the stipulations themselves; for it seems to us that the question is not as to the provisions of the contract, but as to the performance of the provisions. The plaintiff is not seeking to set up a contract from which a material provision has been omitted by the oral consent of the officers of the company. The policy contained the usual provisions as to notice and proofs of loss. Upon the happening of the loss, the plaintiff sent to the defendants certain notices and proofs in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice to the insured. If they failed to do so, if they proceeded to negotiate with the plaintiff, without adverting to the defects, if, still further, they put their refusal to pay, on other and distinct grounds, they are, upon familiar principles of law, estopped to set up and rely upon the defective notices; the law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary." After citing several authorities the learned judge proceeds: "If the plaintiff relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification or addition by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question is not open. The adherence to and liberal application of this principle are necessary to

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the maintenance of good faith and fair dealing in judicial proceedings."

We concur in the reasoning of the court in 12 Gray, and consider it applicable to the present case. According to our construction of the last clause in the eighth condition of the policy, it refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance and are essential to make it a binding contract between the parties; and which are properly designated as *conditions*; and that it has no reference to those stipulations which are to be performed after a loss has occurred; such as giving notice and furnishing proofs of loss. These are not conditions inherent in the contract itself, but stipulations to be performed by the assured as preliminary to his right of action on the contract, or to the liability of the company to pay the loss. When we read this part of the eighth condition with the context, and construe the whole together, we are satisfied that it has no reference to the requirements with regard to the preliminary proofs of loss found in the "tenth condition" of the policy; and that it was not contemplated with respect to them, that no defect or omission could be waived by the company without a written agreement to that effect indorsed upon the policy.

The cases of *Hale v. Mechanics' Mutual Fire Ins. Co.*, 6 Gray, 163; *Forbes v. Agawam Mutual Fire Ins. Co.*, 9 Cush. 470, and *Abbott v. Gatch*, 13 Md. 314, cited by the appellant, seem to us to be inapplicable. In each of those cases, the matters which the parties stipulated should be evidenced only by agreement in writing, constituted an integral part of the contract essential to make it binding between the parties.

In our opinion there was no error in granting the first prayer of the appellee; and for the reasons before stated the second prayer of the appellant was properly refused.

The next question arises upon the first prayer of the appellant.

The witness James P. Smith, Jr. (the president of the ice company), stated in his testimony, that the "ice-house was nearly as good as new, for the reason that he always kept a crew of men and a carpenter or two about the building the year round, and was constantly making repairs and keeping the building in thorough condition." The appellant contends, and by its first prayer asked the court to instruct the jury that these facts, if believed by them, vitiate the policy under the memorandum printed thereon entitled

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“Builders’ Risk,” which provided that “the working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics, in building, altering or repairing the premises named in the policy, without permission indorsed in writing on the policy, should vitiate it.”

We think that by a fair and reasonable interpretation of this article of the policy it cannot be understood as referring to the casual patching up of the building, such as spoken of by the witness; but as prohibiting such hazardous use of the building as is generally denominated “*Builder’s Risk*,” which arises from placing it in the possession or under the control of workmen for re-building, alteration or repairs. To place upon it such a construction as contended for by the appellant would defeat the intent of the parties, and be repugnant to the written clause of the policy *insuring the building*; which, looking at its size, structure and use, must have reasonably contemplated the necessity for such repairs as the witness described, as indispensable to the proper conduct of the appellee’s business. The evidence shows that the building was two hundred and sixteen feet long and one hundred and forty feet wide; that the height, from the top of the sill to the under sill of the plate, was twenty-six feet; that the walls were of joists three by six inches, hollow two feet thick, filled in with tan; the materials all wood, bound with iron. There was a balcony round the upper part of the house, and an inclined plain, or tramway, fourteen feet wide, extending from the lake to the plate of the ice-house, on which the ice was dragged up by horse power. The capacity of the house was *twenty-four thousand tons* of ice. It is very obvious that a building so constructed would necessarily be constantly liable to be injured and damaged by the use for which it was intended, rendering it indispensable for the prosecution of the business of the appellee, that breakages should be repaired as they occurred; all of which was known to the appellants, and will be presumed to have been in their contemplation at the time the contract was made, and permitted by the written terms of the policy insuring the premises as an ice-house.

For the principles governing the construction of policies of insurance we refer to *Harper v. The Albany Mutual Insurance Co.*, 17 N. Y. 194, and *Washington Fire Insurance Co. v. Davison & Symington*, 30 Md. 92, 107, 108.

We think there was no error in refusing the appellant’s first prayer. And upon the same principle, the modification made by the court

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below in the appellant's *third*, *sixth* and *seventh* prayers is free from objection.

The modification added to the appellant's *fifth* prayer stated the law correctly, and though it appears to have been excepted to below, has not been made a ground of objection in the argument in this court.

The appellant was not entitled to have its *eighth* prayer granted, as there was no evidence whatever of any misrepresentation as to contributing insurance made at the time of the contract.

The proposition asserted in the *ninth* prayer, that the assured was obliged to continue the same insurance on the property as existed at the time of the application, is erroneous, and was properly rejected. There was no such warranty in the policy. *Forbush v. Western Massachusetts Insurance Co.*, 4 Gray, 337.

The appellant's *tenth* prayer was also properly refused. It asks an instruction to the jury, "that there is no legal and competent evidence in the cause to show that the plaintiff had any legal insurable interest in the property mentioned as destroyed by fire, either at the time of the making of the policy, or at the time of the fire."

The proof in the cause is, that the appellee was in possession of the property, claiming and occupying it as its owner. This is *prima facie* evidence of title. "A person in possession of land is *prima facie* presumed to be seized in fee." 1 Phillips on Evidence, 646, and note. In the absence of proof of an outstanding title in others, or any incumbrance upon the property, this *prima facie* presumption of a seizin in fee, growing out of the occupation by the appellee as owner of the property, was sufficient to show an insurable interest therein, and, consequently, there was no error in rejecting the tenth prayer of the appellant.

There appearing to be no error in the rulings of the court below, we affirm the judgment.

Judgment affirmed.

CRISFIELD, appellant, v. STORR.

(28 Md. 132.)

Devise — merger of life estate in fee — infant in ventre sa mere. Warranty.

A testatrix devised real estate to her daughter and sole heir S. for life; but "if the said S. shall have a child to cry," then to said child; and if said child should die, then over. S. and her husband conveyed the estate with warranty to P., and four months after S. had a child W. born alive. W. recovered judgment in an action of ejectment against the grantee of P. In an action by the grantee of P. against P. on the covenant of warranty, *held* (1) that the life estate of S. under the will was not merged by the descent of the fee; (2) that the remainder in fee was vested in W., he being in ventre sa mere at the time of the conveyance from S.; (3) that W. was not barred by the warranty of his parents.

IN 1834, Thomas Watson conveyed one undivided half part of his farm in Dorchester county, known as the "Tootell Land," to his mother, Mary Watson, in fee, and afterward died intestate, leaving his sister, Sally Bradshaw, wife of Joseph Bradshaw, his only heir at law, to whom the other half of said farm descended. In 1837, Mary Watson died, having first executed a will in due form to pass real estate, by which she devised to Sally Bradshaw, for life, all that part of the farm which had been conveyed to her by Thomas Watson, with a limitation over as follows: "But if the said Sally Bradshaw should have a child to cry, then it is my will and desire that the above-mentioned land should go to the said child; but if the said child should die, then it is my will and desire that the above-mentioned land should go to Algernon S. Piercy, son of the late George Piercy, during his natural life, and then it is my will and desire that it should go to George W. Piercy, to him and his heirs lawfully begotten, forever in fee simple." On the 24th of May, 1842, Joseph and Sally Bradshaw conveyed all said farm to Henry Page, in fee with a covenant of warranty against all persons who might thereafter claim the same under the will of Mary Watson, and against all persons whatsoever, except Algernon S. Piercy, who had, on the 23d of May, 1842, conveyed all his interest in said land to said Page. On the 25th of September, 1842, Sally Bradshaw had a son, William Eugene Sulivane Bradshaw, born alive. On the 24th of January, 1843, Henry Page and wife conveyed said

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land to Leah S. Howard, in fee with warranty, and on the 7th day of November, 1844, she conveyed the same to Thomas Storr in fee, with warranty. Thomas Storr died in the spring of 1866, having first made his will in due form to pass real estate, by which he devised one part of said land to his son William W. Storr, and the remaining part to his son John H. Storr. On the 2d day of July, 1867, William E. S. Bradshaw brought his action of *ejectment* against William W. and John H. Storr, to recover one-half of said land, devised to him in remainder by Mary Watson's will, and on the 7th day of March, 1868, recovered a judgment for the same. The defendants in the *ejectment* brought suit on the 17th day of March, 1870, on the covenant of Henry Page, he and his wife being then dead, against his heirs, who are the appellants in this case. At the trial of the case below, a demurrer was filed to the *narr.* and was overruled, and exceptions were taken to the granting of the two prayers of the plaintiffs and to the rejection of the four prayers of the defendants, and the judgment being in favor of the plaintiffs, the defendants appealed.

GRASON, J. It was admitted, at the argument of the case in this court, that under the will of Mary Watson, Sally Bradshaw took a life estate in the one-half of the land named, with remainder in fee to her unborn child, and, in the event of such child dying, then with remainder over; and that the fee descended to Sally Bradshaw, *sub modo*, so as to let in her after-born child, in the event of one being born. It was contended, however, that the remainder, limited to Sally Bradshaw's unborn child, was a contingent remainder, and that it was destroyed before the birth of the child, either by the merger of the life estate, which Sally Bradshaw took under her mother's will, in the fee, which descended to her as heir at law of her mother; or by the deed from Joseph and Sally Bradshaw to Henry Page, which it was alleged operated as a feoffment, or by the warranty of Joseph and Sally Bradshaw, which being a collateral warranty descending from them to W. E. S. Bradshaw, their heir, barred his recovery. We do not think that either of these points is tenable. In the first place there was no merger of the life estate in the fee in Sally Bradshaw, for the reason that the fee descended from the same person under whose will she took the life estate, and the life estate began and the fee descended at the same instant. Maine, in his work on Contingent Remainders, marg. 344, says:

“Wherever a testator limits a contingent remainder, it is agreed that the inheritance descends to the heir only till the contingency happens; if so, nothing can be more absurd than to make such descent destroy the contingency. The will does not operate till the testator’s death; the descent takes effect at the same time: so that, under such a construction, the particular estate, given to the heir by the will, arises and is destroyed in one and the same instant; and how is it destroyed? by the descent which that very same will permitted. This would be making a will and no will at the same time, and would, in effect, be saying, that a limitation of a particular estate in a will to a testator’s heir at law, with a contingent remainder over without any ulterior vested remainder, must be void in its creation. For it is evident that, under such a construction, the particular estate can never take effect at all, its existence and destruction commencing together; and that being destroyed, the contingent remainder over is also gone before it has even a moment’s chance for existence.” Now this would be making the will, in this respect, *ipso facto*, void. See also *Plunket v. Holmes*, 1 Lev. 11; *Boothby v. Vernon*, 9 Mod. 147; 4 Kent’s Com. 253, 254. So that, even if the estate limited to the unborn child of Sally Bradshaw be a contingent remainder, it would not have been destroyed by a merger of Sally Bradshaw’s life estate in the fee which descended to her as heir at law of her mother.

But there is another answer to this point, which applies with equal force to the point that the deed from Bradshaw and wife to Page operated as a feoffment, and is conclusive of both, even if that deed could be regarded as a feoffment, which we think its language and terms would not warrant us in holding it to be. At the date of that deed, William E. S. Bradshaw was *en ventre sa mere*, and the remainder became vested and was not contingent.

In the case of *Reeve v. Long*, 1 Salk. 228, marg., it was held by the house of lords, upon appeal from the common bench, that, where a testator devised an estate for life to his nephew, Henry Long remainder to his first son in tail male, remainder to his successive sons, and in default of such issue, then over; and Henry Long died, his son born after his death took the remainder. Chancellor KENT (4 Comm. 249, marg.) refers to the case of *Reeve v. Long*, and says: “It is now settled law in England and in this country that an infant, *en ventre sa mere*, is to be deemed *in esse* for the purpose of taking a remainder, or any other estate or interest which is for his

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benefit." But it was argued that, as the remainder, in this particular case, was limited to such child as should be born *to cry*, it was dissimilar to a remainder to a child of Sally Bradshaw, and that it could not therefore vest until the contingency happened, that is, until a child was born, AND CRIED. Even if this were so, we have shown that there was no merger and no feoffment by which the contingent remainder could be destroyed. But it is evident that nothing more was intended by the use of the words, "*born to cry*," than that the child should be born alive. This is made manifest by the terms used in the will in limiting the remainder over to Algernon S. Piercy, which was to take effect only in the event of the child *dying*, clearly showing that it was the testatrix's intention that the remainder to the unborn child of Sally Bradshaw should take effect if it was born alive. This being so, we have shown that the remainder vested in the child, *en ventre sa mere*.

It was also argued with much earnestness that William E. Bradshaw was barred from recovering the land in question, by the collateral warranty which descended upon him, and that the statute of IV Anne, chapter 16, is not in force in this State. That statute is found in Kilty's Brit. Stat. 246, among those which are in force in this State, and he says that the 21st section is proper to be incorporated as applicable to our circumstances; and as there is no case to be found in which a collateral warranty has been enforced in our courts, we must presume that it has always been considered in force here, especially as it is peculiarly "applicable to our circumstances," and well adapted to the policy of our laws and system of government, which favor and facilitate the free disposition and transmission of real estate. The 21st section of the statute provides that all warranties which shall be made after the time therein mentioned by any tenant for life, of any lands, etc., the same descending or coming to any person in reversion or remainder, shall be void; and that all collateral warranties of any lands, tenements or hereditaments made by any ancestor who has no estate of inheritance in possession in the same, shall be void against the heir. The warranty of Bradshaw and wife to Page is therefore void as against Wm. E. S. Bradshaw, and cannot affect his right of recovery against the defendants in the action of *ejectment*, because at the time of the warranty the remainder had, as we have shown, vested in him, and Sally Bradshaw had then a life estate only in hand.

The remainder of the opinion discusses a question of practice.

HOUGH, appellant, v. HORSEY.

(23 Md. 181.)

Usury — when not a defense by purchaser of land subject to mortgage.

Plaintiff purchased real estate subject to a mortgage and, as part of the consideration, agreed to pay the mortgage debt. *Held*, that plaintiff could not maintain a bill in equity to restrain a sale of the premises by the mortgagee under a power in the mortgage, on the ground that the mortgage debt was usurious.

BILL in equity to restrain the sale of premises under a mortgage.

The plaintiff, Amelia M. Hough, purchased in November, 1870, premises for the sum of \$14,000 “and the payment of a mortgage on the property for \$2,000 held by S. H. Horsey.” The mortgage debt thereafter remaining unpaid, the mortgagee advertised the property for sale under a power contained in the mortgage. The plaintiff filed her bill to restrain the sale, charging therein, that the mortgage was not legally stamped; that the amount claimed by the mortgagee was in excess of the amount really due, to the extent of \$700, being an illegal bonus paid by the mortgagor.

The court below refused an injunction and the plaintiff appealed.

Frank H. Stockett, for appellant.

Alexander Randell, for appellee.

ALVEY, J. We think the order of the court below refusing the injunction should be affirmed, and for the reason assigned by the judge, that the bill of complaint presents no proper ground for relief.

The charge in the bill in regard to the omission of the proper revenue stamp on the mortgage, and the defect in the affidavit thereto, are shown to be groundless by the production in court of the original mortgage itself. The only other ground for the injunction seriously relied on, is the charge of the existence of usury in the mortgage debt. But as to this latter charge, apart from the very general and imperfect manner in which it is made, and the failure to show that tender and offer to pay the real debt with legal interest

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had been made to the defendant, the complainant is not in a position to entitle her to be relieved from what is charged to be usury in the contract upon which the mortgage debt is founded. She is in no wise damnified, and to allow her the benefit of the abatement of the mortgage debt now claimed would be in effect allowing her to defeat in part her own contract with the mortgagor.

The complainant purchased the mortgaged estate from the mortgagor, and by the deed of conveyance, which is exhibited with the bill, she was to pay as part of the consideration mentioned in the deed, and in addition to the sum of \$14,850, the mortgage debt of \$2,000 due to the defendant; and it is this mortgage debt which is now alleged to be affected with usury, and which the complainant seeks to have reduced. The mortgagor makes no complaint himself, and he is not a party to this bill. If the mortgage debt were to be reduced on the present application, by reason of the alleged usury in the contract, it is manifest the complainant would get the estate purchased for less than she agreed to pay for it. Whether the mortgage debt was tainted with usury or not, was wholly immaterial in determining the price agreed to be paid for the land. The complainant agreed specifically to pay the mortgage debt according to the face of the mortgage, as a part of the consideration for the land purchased; and this feature essentially distinguishes the present case from that in which the purchase is made of the mere equity of redemption, without any special agreement as to the application of the purchase-money, or any reference whatever to the particular amount due on the outstanding mortgage. Here the whole estate was purchased, with a special agreement for the application of a certain part of the purchase-money; and the effect of the present application is to relieve the complainant from doing what she has expressly agreed to do, and upon the faith of which she obtained the conveyance for the land embraced by the mortgage. Such a proposition cannot be entertained by a court of equity for a moment. If usury has in fact been exacted, the right remains with the mortgagor to sue for and recover back all over and above the legal rate of interest that he may have been required to pay. *Scott v. Leary*, 34 Md. 389. But this right of action has not been assigned to the complainant nor is she in the slightest degree interested in it. If such right of action exists, the mortgagor may avail himself of it or not, as he may think proper; but if he thinks that good faith forbids his resort to the remedy afforded by the law, no person has a right to

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Hildebrand v. Fogle, 20 Ohio, 157; 1 Greenl. Ev., §§ 295, 298; *Kellogg v. Smith*, 7 Cush. 382; *Frost v. Spaulding*, 19 Pick. 445.

BRENT, J. The question presented by the first and second bills of exchange in this case is the admissibility of parol evidence to show that the deed from Sophia Fitzhugh to Benjamin Lancaster, under which the appellee claims title, is truly located upon the plats. The deed describes the land sued for as beginning "at a rock on the north side of the road from Boonsborough to Williamsport, near the N. E. corner of the deed from ——— to John S. Rowland for part of the said manor, and running from thence, on the north side of said road, *north thirty-eight degrees, east twenty-two degrees, south sixty-three degrees, east thirty-five, south thirty-eight degrees, west twenty-five and one-half degrees*, then by a straight line to the beginning," etc. The object of the evidence offered was to show that where *degrees* are mentioned in the deed, at the end of the first line of the land, *perches* should be substituted, and also to show that *perches* ought to have been inserted at the end of the second and third lines.

While the general rule was conceded by the counsel for the appellee, that parol evidence was inadmissible to alter or change a written instrument, it was contended that this deed was so ambiguous in the courses and distances given, that parol evidence must be admitted to explain them. The effect of the offer is very clearly to our minds not to explain, but to change the language of the deed, and to insert words which it does not contain. If there is an ambiguity, it is a patent one, and the evidence offered, instead of explaining and giving effect to the terms of the deed, varies and contradicts them. "Parol evidence cannot be admitted to contradict or control the language of a deed; but latent ambiguities may be explained by such evidence." 3 Washb. on Real Prop. 347. In the case of *Newcomer v. Kline*, 11 G. & J. 457, a bill in equity was filed to insert the word *dollars* in a single bill which had been drawn for "three hundred and ten, for value received." To this bill the defendant demurred, among other reasons assigned, upon the ground that the complainant had a remedy at law, and could maintain an action upon the single bill by making proper averments in the declaration, stating that the omission of the word "dollars" was the result of a mistake in writing the single bill, and proving the averments by parol evidence. The court, in their opinion, say: "The complain-

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ant had not full and adequate remedy at law, and was therefore entitled to the relief which he solicited at the hands of a court of equity. * * By mistake and accident, as charged in the bill, to which there was a demurrer, the word 'dollars' was omitted, in consequence of which the plaintiff was deprived of the specific security which was intended to be given, and was unable to support his action upon the single bill, in a court of law, as a specialty. The principle being well settled, that the consideration of a single bill cannot be inquired into, or a failure of it averred or proved in an action at law. *Key v. Knott*, 9 G. & J. 342. It is, therefore, inconsistent with the legal attributes of such an instrument, or its character of conclusiveness, as a specialty, *that it should rest partly in writing and partly in parol*. Where the ambiguity is not latent, and raised by extrinsic evidence, but patent or apparent on the face of the instrument, parol evidence is not admissible to explain such ambiguity; as where a blank is left for a devisee's name in a will, parol evidence cannot be admitted to show whose name was intended to be inserted." Rosc. Ev. 12.

To admit the parol proof, offered in this case to explain and modify the deed before us, would be in direct opposition to the principles here laid down. It would make the deed "rest partly in writing and partly in parol;" would substitute an important word for another — that is, *perches* for *degrees* — and fill up by inserting the word "perches," what is claimed to be a blank at the end of the description of the second and third lines of the tract of land, which was intended to be conveyed. This cannot be done. In the case of *Thomas v. Turvey*, 1 H. & G. 435, which was an action of *ejectment*, title was claimed, under a levy and deed by the sheriff for "part of a tract of land called Borough Hall," without further description. It was attempted to identify by extrinsic evidence the land levied upon and sold, but the court held it to be inadmissible. They say "a deed for part of a tract of land, designating the quantity, but without any description of the part sold, when unsupported by the principle of election, would be void. The ambiguity on the face of the conveyance cannot be explained by extrinsic circumstances."

The cases relied upon by the appellee rest upon different principles and are not applicable to the one before us. In the case of *Dorsey v. Hammond*, 1 H. & J. 190, the grant was an old one, and the fifth and last line called to run in a *straight* line from a point

on the river to the beginning, which also stood upon the river. The whole tract was described as "lying on the west side of the north branch of Patuxent river," and not until the last line was run and located did it appear that it did not bind upon the river. Here arose a latent ambiguity, and the court left it to the jury to determine, under all the circumstances, whether this line did not in fact bind upon the river. If so, the river was a controlling call and the line must go to it. The cases of *Connelly v. Bowie*, 6 H. & J. 144, and of *Rogers v. Moore*, 7 id. 141, present questions of the true locality of a boundary. There was no ambiguity upon the face of the grant in either case, but the ambiguity was raised by extrinsic evidence. The cases of *Stanley v. Green*, 12 Cal. 162, and *Commonwealth v. Roxbury*, 9 Gray, 490, were also old grants, and turned upon the doctrine of "reasonable intendment," as ascertained from the grants themselves.

It was very strongly urged in the argument for the appellee, that before a deed is declared void for want of certainty in the description of the lands intended to be conveyed, the law will lay hold of extrinsic facts and call in surrounding circumstances to aid in the interpretation of the expressions used. This will depend upon the character of the uncertainty, which it is attempted to remedy, and will be understood by a reference to one of the many cases in which this doctrine is announced. In the case of *Crafts v. Hibbard*, 4 Metc. 452, it is said, "it is well settled that parol evidence cannot be introduced to contradict or control the language of a deed, but it is equally well settled that latent ambiguities may be explained by such evidence. Facts, existing at the time of the conveyance and prior thereto, may be proved by parol evidence, with a view of establishing a particular line as the one contemplated by the parties, when such line is left, by the terms of the deed, ambiguous and uncertain." That is, where the ambiguity is a latent one; but not where such evidence would contradict or control the language of the deed.

The deed before us does not present a case of latent ambiguity, but the uncertainty and ambiguity complained of is apparent upon its face. The parol evidence, which was offered and admitted by the court below, as set forth in the first and second bills of exception, alters and contradicts it, and we think was clearly inadmissible. This deed is vital to the recovery of the appellee, who was

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plaintiff below, and as it cannot be located, there is no reason for sending the case back for a new trial.

Judgment reversed.

NOTE.—See *Donley v. Tindall*, 5 Am. Rep. 234 and note; *Wilmington v. McGaughey*, 8 Wm. Rep. 673 and note; *Kurts v. Hibner*, 8 Am. Rep. 665 and note.—REP.

HAMILTON, appellant, v. WINDOLF.

(33 Md. 801.)

Action — distress.

An action will not lie for distraining for more rent than is due.

THE opinion states the case.

W. H. A. Hamilton and R. Hamilton, for appellant.

C. D. McFarland, for appellee.

ALVEY, J. The declaration in this case contains two counts ; and in regard to the first of which it is rather difficult to determine whether it was intended to be in trespass for an illegal distress, or in case, for an excessive distress. As intended for either form of action it is certainly very imperfectly drawn. The second count is for a direct injury done to the plaintiff's wall, and is framed in trespass.

The case was tried upon the general issue plea, that the defendant did not commit the wrongs alleged.

At the trial below seven exceptions were taken, but only two or three of which are important to be decided on this appeal.

The plaintiff gave in evidence, in support of the first count in his declaration, the sub-lease to himself from the defendant, dated the 3d of May, 1869, of the premises, in respect of which the rent was alleged to be due, whereby the plaintiff agreed to pay the defendant the yearly rent of \$36, accounting the same from the 1st of January, 1869, in equal installments of \$18 each, on the 1st of January and July respectively, in every year during the continuance of the

lease ; the defendant reserving to himself the right of distress for any arrearages of the rent-agreed to be paid. The plaintiff also gave in evidence certain distress proceedings, dated the 17th of January, 1871, taken by the defendant against the goods of the plaintiff, for the sum of \$72, rent alleged to be then in arrear under the lease to the plaintiff; and also proved, by the constable to whom the distress warrant was directed, that the same had been levied ; but neither the schedule of the goods taken, nor their value, is made to appear. The constable also proved that after levying the distress, the plaintiff had paid the amount of rent claimed to be due, without making any objection to it.

The plaintiff further proved, for the purpose of showing that the distress had been taken for more than was actually due, that the defendant had rendered him an account of the rent in arrear, in which a credit of \$25 had been given, and that he was entitled to such credit for money received by the defendant to his, the plaintiff's, use ; thus reducing the amount of the rent claimed by the defendant, and for which he had taken the distress.

It is not claimed, nor pretended, by the plaintiff that no rent whatever was due for which distress could be taken. On the contrary, the point of grievance is, that distress was taken for more than was due, if proper credit had been given. Some rent, it is conceded, was due and in arrear.

Proceeding upon this theory of his rights, the plaintiff, by his first prayer, asked the court to instruct the jury, which was done accordingly, that if they should find that the distress had been levied, as stated in the evidence, and that the defendant declared his purpose to remove the goods distrained, unless the rent claimed to be due was paid ; and that the plaintiff did pay the amount of rent claimed, with the costs of distress ; and should further find that the said sum of \$72 *was not due and in arrear from the plaintiff to the defendant for rent* ; then the plaintiff was entitled to recover, *under the first count in the declaration*, such actual damage as the jury might find the plaintiff to have sustained.

On the other hand, the defendant prayed the court to instruct the jury, which was refused, that if they should find that the defendant distrained for more rent than was really due and owing, and that such distress was made as testified to by the constable Hayne, and others, then it was legal and the plaintiff was not entitled to recover under the first count of the declaration.

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The question thus presented, on the pleading and evidence, is whether the distress, taken for a larger sum than was due at the time (assuming such to be the case), was legal, or whether it was void, rendering the defendant liable as for a trespass.

It will be observed that by the instruction given, the plaintiff became entitled to the verdict upon the finding by the jury of the fact that the distress had been made for \$72, and that the precise amount was not due at the time. By showing the amount due to be less, however trifling less, than the amount for which the distress was levied, the plaintiff, under this instruction, became entitled to recover. This is clearly not justified by the law, as it is now well settled. The prayer of the defendant, as to the plaintiff's right to recover under the first count of the declaration, should have been granted.

In the case of *Taylor v. Henniker*, 12 Adol. & El. 488 (40 Eng. C. L. R. 105), it was decided by the queen's bench, notwithstanding some previous cases to the contrary, that a distress taken for more than was due was unlawful in its inception, and that an action would lie at common law for such a wrong. But that decision came to be deliberately reviewed in the case of *Tancred v. Leyland*, 16 Adol. & El., N. S., 680 (71 Eng. C. L. R. 668), and was overruled; and, in the last-mentioned case, it was decided that the simple fact of making a distress for an amount larger than that really due, and selling the goods under such claim; is not actionable. This case of *Tancred v. Leyland* has been followed by several others, after very full discussion of the question.

In the case of *Glynn v. Thomas*, in the exchequer chamber, 11 Exch. 870, the declaration alleged that the plaintiff held certain premises as tenant to the defendant, and that the latter wrongfully distrained certain goods of the plaintiff, as a distress for an alleged amount of rent then due; and that the defendant wrongfully remained in possession of such goods, under color of the distress, until the plaintiff was compelled to pay, and did pay, to the defendant the pretended arrears of rent and costs of the distress, in order to regain possession of the goods; whereas, in truth, only a small part of the pretended arrears of rent was due. It was held, after much consideration, that this declaration disclosed no cause of action; for as the distress was lawful, the defendant was entitled to a tender of the amount really due, and upon his refusal to accept that sum, the plaintiff's proper course was to replevy the goods. It

was there said, however, to be clear law, as it undoubtedly is, that if the untrue claim had been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear, with legal charges, a sufficient cause of action would have arisen. In such case, the goods would not be subject to a replevin after sale.

In reference to the taking and detention of the goods by the defendant, and the payment by the plaintiff of the amount of rent claimed to be due, in order to regain possession of his goods, the court said: "It is alleged, however, in the count before us, that the plaintiff was compelled to make payment, and did make it, in order to regain possession of his goods; and this allegation being taken to be true, we must assume now such a state of facts as would have proved it, if put in issue. But the facts necessary for that purpose would be merely that the plaintiff demanded the goods, and that the defendant refused to deliver them, unless the alleged arrears with the charges of the distress were paid, and that the payment was made in consequence. Still this would not make the demand extortionate, or the payment such as could be recovered back in this form of action, unless from these facts it followed that the detention of the goods became unlawful. Now as some rent was due, the taking was lawful; and as the taking was lawful, so was the detention until the sum really due, with enough to cover the lawful charges, was tendered."

The declaration in the present case alleges that the distress was maliciously made; but that can make no difference; for in the case of *Stevenson v. Newnham*, 13 C. B. 297, an action against a landlord for distraining for more rent than was really due, and where a similar allegation of malice was made, the court said that such allegation was wholly immaterial, for an act which does not amount to a legal injury cannot be actionable because it may be done with a bad motive or intent.

The case of *Tancred v. Leyland* and *Glynn v. Thomas* have both been recently referred to and sanctioned by this court, in the case of *Jean v. Spurrier*, 35 Md. 110, where the question of the legality of a distress was involved.

[The remainder of the opinion discusses an unimportant question of evidence.]

Baker v. Wainwright.

BAKER V. WAINWRIGHT.

(36 Md. 336.)

Statute of frauds—agreement to purchase land for another. Parol evidence.

Plaintiff, at defendants' request, bought lands at sheriff's sale in his own name for their benefit. The defendants promised orally to pay the purchase-money, but failed to do so; whereupon, pursuant to the conditions of sale, the land was resold at a less price and plaintiff was compelled to pay the difference, to recover which this action was brought. *Held*, that the contract between plaintiff and defendants was one of agency and not within the statute of frauds, and was therefore provable by parol evidence.

ACTION OF CONTRACT. The verdict and judgment were for the defendant and plaintiff appealed.

Henry W. Archer, for appellant.

Albert Constable and Reuben Haines, for appellee.

BARTOL, C. J. This action was instituted by the appellant, to recover compensation and indemnity for liability and expenses incurred by him, in the service and employment of the appellees as their agent.

To support the plaintiff's case, parol evidence was offered (subject to exception as to its admissibility) as follows:

"That on the 1st day of March, 1867, the defendants desiring to purchase a parcel of land situated in Delaware county, in the State of Pennsylvania, which was then about to be sold at public auction by the sheriff of that county, and for the purpose of securing a debt due to them by the owner thereof, and wishing not to be known as the purchasers thereof, requested the plaintiff to attend the sale, and bid for, and purchase the land for them at a price not exceeding \$8,000. That plaintiff, in company with the defendants and their attorneys, attended the sale, and plaintiff bid for the land to the amount of \$7,025, at which price it was knocked down to him by the sheriff, as the purchaser; \$200, a part of the purchase-money, was paid by him in cash to the sheriff, and the defendants immediately after, then and there, gave him their check for the same."

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It was further proved (also subject to exception) that at the time and place of sale, in the presence of the defendants and their attorneys, the following instruments of writing were signed, viz.:

"The conditions of sale of all the right, title and interest of John A. Morris, Thomas H. Wilson and John H. Musser, trading as Morris, Wilson & Co., of, in and to the real estate described in the above annexed advertisement of sale are as follows:"

"*First.* The highest and best bidder by fair and open bids shall be the purchaser."

"*Second.* \$200 of the price, or sum at which the above described premises may be struck off, must be paid at the time and place of sale, * * * and the residue of the purchase-money must be paid to the sheriff at his office in the borough of Media, on or before the 4th Monday of March, 1867."

"*Third.* If the person or persons to whom said real estate may be struck off, shall neglect to take the same at his or their bid, and fail to comply with the conditions of the sale thereof, the same will be exposed to sale again by reason of such default, at the sole risk of the purchaser or purchasers thereof, who shall derive no benefit from such second sale; but he or they shall pay any and all deficiency between his or their bid, and the price the same shall bring at such subsequent sale, with all interest, costs and expenses consequent thereon."

"*Fourth.* The purchaser complying with the conditions, shall have a deed made in due form of law, on paying the customary fees.
(Signed)

"CALEB HOOPES, *Sheriff.*"

"I do hereby acknowledge that the real estate described in the advertisement of sale, was fairly struck off to me at my bid, at and for the price or sum of \$7,025, which sum I do hereby acknowledge myself indebted to Caleb Hoopes, sheriff, and bind myself for the payment of the same, agreeably to the conditions of sale."

"In testimony whereof, we have hereunto set our hand and seal, this first day of March, A. D. 1867.

(Signed)

"GEO. BAKER. [*Seal.*]

"Witness present at signing,

"B. F. BAKER."

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“Received two hundred dollars, part of the purchase-money for the real estate described in the advertisement of sale.

(Signed) “CALEB HOOPES, *Sheriff.*”

“And further proved that the defendants then and there thanked plaintiff for what he had done in the premises, and promised to comply with the conditions, and pay the residue of the purchase-money for the land, when payable, according to the terms of sale, and that plaintiff should have no further trouble in the matter, and that plaintiff directed that the sheriff's deed for the land should be made to the defendants, and the time and place were appointed for the payment of the money, and the delivery of the deed as aforesaid, and the defendants assented and expressed themselves as fully satisfied with the arrangement. That the parties met accordingly at the time and place appointed, when defendants said that they were unable to procure the balance of the purchase-money, and requested and obtained an extension of time from the sheriff, for about six weeks, at which time they promised to pay the same, but that they failed to do so, and the property was afterward resold by the sheriff at a less price, and purchased by a brother of the defendants.”

“That plaintiff was thereupon sued by the sheriff for the balance of purchase-money on the first sale mentioned, and judgment was obtained against him thereon on the 27th day of February, 1868, for the sum of \$3,749.87, with interest and costs, which plaintiff was compelled to pay under execution, as shown by the record of the judgment offered in evidence by the plaintiff. The plaintiff frequently called upon defendants to furnish the money for payment of the balance of purchase-money, and they frequently promised to do so, and to pay plaintiff for all his payments, trouble and expense in the premises, and for that purpose assigned him a claim, on which he realized about \$3,000.”

“It was further proved that when the suit of the sheriff against the plaintiff came on for trial in the court of common pleas in Delaware county, Pennsylvania, the defendants attended for the avowed purpose of defending the suit, and the attorneys who appeared on the record as the attorneys of Baker, had been consulted by the Wainwrights in reference to the suit. That there was a consultation between the said attorneys, the defendant and Baker (the plaintiff in this cause), in reference to the case, and the proper course to be pursued, and it was agreed that judgment should be entered for the

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aforesaid sum of \$3,749.87, on condition that a stay of execution thereon should be given for three months, at which time the defendants promised to pay the said amount, and at their request the judgment was entered accordingly."

The object of this suit is to recover the balance of the money thus paid by the plaintiff, which remains unpaid to him by the defendants, with interest thereon, being the loss, cost and expenses incurred by the plaintiff in the service of the defendants as their agent.

The only question material for us to decide on this appeal arises upon the third bill of exceptions. Upon the state of facts disclosed by the testimony, which we have set out at length, six prayers were offered by the plaintiff, all of which were refused, and the circuit court, at the instance of the defendants, instructed the jury "*that the evidence in the cause was not legally sufficient to entitle the plaintiff to recover.*"

The ground on which the appellees support this instruction, and that upon which the whole defense rests, is that the contract between the appellant and appellees, as shown by the proof, comes within the *fourth section* of the statute of frauds, which declares "*no action shall be brought upon any contract, or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged, or some other person thereunto by him lawfully authorized.*"

Unquestionably the claim of the plaintiff in this case is a most just and meritorious one, and if this defense is to prevail, there would seem to be a failure and denial of justice.

It was remarked by Chief Justice BUCHANAN, in delivering the opinion in *Lamborn v. Watson*, 6 H. & J. 255, where the defense under the statute was successfully relied on for the protection of a dishonest defendant, "*that the statute probably generates as many frauds as it prevents.*" Still the statute is binding upon us and must be obeyed and enforced whenever a case falls within its provisions. The experience of nearly two hundred years has proved its wisdom, and whatever opinions may have been expressed with regard to the apparent hardship, sometimes caused by enforcing its requirements of written testimony in certain cases, it has no doubt in the main served the purpose of its enactment, in

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the prevention of frauds and perjuries, and proved a great safeguard and protection against illegal and groundless claims. Nowhere have its provisions been more strictly and constantly enforced than in this State. We are not in favor of impairing or restricting its operation. But, in the opinion of a majority of this court, the present case does not fall within either the letter or the spirit of the *fourth section*.

The contract upon which the liability of the defendants arises is not one involving a title to land. It is simply a contract of agency, under which the plaintiff, as agent, has incurred loss and expense, for which he seeks compensation. Judge STORY, in his work on Agency, § 339, says: "If an agent has, without his own fault, incurred losses or damages in the course of transacting the business of his principal, he will be entitled to full compensation therefor."

In this case, the business and employment of the agent, it is true, was to purchase land; but this does not bring the case within the 4th section of the statute. The purchase of land was a matter collateral to the contract, which constituted the relation of principal and agent between the parties, and on which the liability arises. To prove this contract, written proof is not necessary. It has long been settled that the employment of an agent under the 4th section of the statute need not be by writing, the authority of the agent may be shown by parol. *Coles v. Trecothick*, 9 Ves. 250. We refer also to Browne on Statute of Frauds, § 370, and 2 Kent's Com. 614, and the *cases there cited*.

In Sugden on Vendors and Purchasers, chap. 4, § 5 (last London Ed. 145), the learned author says: "In the 1st and 3d sections of the statute of frauds, which relates to lease, etc., the writing is required to be signed by the parties making it, or *their agent authorized by writing*. This latter requisite is omitted in the 4th and 17th sections of the statute. The legislature seems to have taken this distinction that where an interest is intended to be actually passed, the agent must be authorized in writing; but that where a mere agreement is entered into, the agent need not be constituted by writing, and therefore an agent may be authorized by parol to treat for, or buy, or sell an estate, although the contract itself must be in writing." For this, many cases are cited in "note a."

If an agent for this purpose can be legally constituted by parol,

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it would seem to follow, logically, that when so appointed, he would be entitled to recover compensation and indemnity for his services rendered, and for his costs and expenses incurred in attending to the business of his principal, and that the principal cannot escape his liability upon the ground that the contract which the agent has been authorized to make, is within the statute of frauds, and must be evidenced by writing.

If the agreement for the purchase of the land in this case had been signed by the plaintiff in the name of his principals, the defendants, for whom the purchase was made, or had been signed by him as agent, there would be no doubt of the right of the plaintiff to maintain this suit. This has virtually been conceded in the argument, but having signed the contract in his own name as purchaser, it is argued that parol evidence is inadmissible to show that the real purchasers were the defendants, and that he signed it as their agent. The argument is that such evidence is inadmissible to bind the defendants, because, it is said, that if the plaintiff had chosen to claim the benefit of the purchase for himself, and had gone on to complete the contract, had paid the purchase-money and obtained a deed, the defendants would have been without remedy, that they would not have claimed the benefit of the contract or been allowed to give parol evidence to prove that the land was purchased for them, according to the decision in *Lamborn v. Watson*, 6 H. & J. 252; *Dorsey v. Clarke*, 4 id. 551, and *Bartlett v. Pickersgill*, 4 East, 576, note a.

If this be conceded, the fact that the plaintiff had it in his power to abuse the confidence reposed in him, and to commit a fraud, is no answer to his demand in the present suit, where the evidence shows that he faithfully performed the service in which he was employed; nor does it in our opinion afford any reason why his appointment as agent may not be shown by parol.

The purchase was made by him in his own name, at the instance and request of the defendants, who were present, assented and approved of what he had done, paid a part of the purchase-money, were well known to the vendor as the real purchasers, and had the opportunity of obtaining the benefit of the purchase, by paying the balance of the price, which they promised to do, and receiving the deed, which the sheriff was directed to make to them. Having failed to perform their contract, and the plaintiff, who had rendered himself responsible by the form in which he had entered into the

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contract having been compelled to pay the money, ought to be entitled to recover the same, as money paid for the defendants at their instance and request.

If the agent makes the contract in his own name, it is well settled that he is personally bound and may be held liable ; but his principal will also be bound, although not named in the contract, if it be shown that the agent was authorized so to contract for him, and in fact entered into the contract as agent for his benefit and in pursuance of his authority ; and there is no good reason why parol evidence may not be received to prove this fact.

Many cases have arisen under the 17th section of the statute of frauds, relating to the sale of goods, wares and merchandise, in which it has been held that where the written contract is made in the name of the agent, parol evidence is admissible to prove that the party signing was agent merely, and some other person was principal.

In *Wilson v. Hart*, 7 Taunt. 295, PARK, J., said : " It is the constant course to show by parol evidence whether a contracting party is agent or principal."

The same doctrine was held in *Higgins et al. v. Senior*, 8 Mees. & W. 834, *Dykers v. Townsend*, 24 N. Y. 60, 61; *Hubbert v. Borden*, 6 Whart. 79; *Ford v. Williams*, 21 How. 287; and by this court in *Oelrichs & Lurman v. Ford*, 21 Md. 489. It is argued that this doctrine applies only to commercial contracts, under the 17th section, and is inapplicable to contracts relating to land falling under the 4th section. It will be observed that the terms of the two sections are substantially the same, so far as they relate to the signing by the party to be bound, or by his agent, thereunto lawfully authorized.

But there are well-adjudged cases in which such evidence has been held admissible, where contracts for the purchase of lands have been made by agents. In Sugden on Vendors and Purchasers, chap. 1, § 3, p. 47, plac. 9, it is said : " Where the principal denies the authority, and the agent is compelled to perform the agreement himself, because he cannot prove the commission, he may afterward file a bill against his principal ; and if the principal deny the authority, an issue will be directed to try the fact ; and if the authority be proved, the principal will be compelled to take the estate at the sum which he authorized the agent to bid." In support of this the author refers to *Wyatt v. Allan*, MS., decided in 1777. which is

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found in the same volume, Appendix No. 7. That case, if it be considered as good authority, settles the question here involved.

The same author on page 145, speaking of the purchase of estates by an agent, says: "But of course, although he purchased in his own name, yet the fact of the agency, so as to charge the principal, may be made out by parol evidence." And cites *Wilson v. Hart*, 1 Moore, 45; *Marston v. Roe*, 8 Ad. & El. 14.

The case of *Wilson v. Hart*, here cited, we have not found; but have examined *Marston v. Roe*, and find that it fully supports the proposition in the text. There, real estate was purchased by Joseph Fox, and the written agreement, evidencing the purchase, was signed by him in his own name (p. 20). At the trial of the cause, the plaintiff, for the purpose of showing that it was John Fox who entered into the contract for the purchase of the land, and that Joseph was his agent in that behalf, and had signed the contract as such agent, offered to give parol evidence that Joseph was appointed by John his agent, for the purpose of making the agreement, and that in consequence of such appointment, Joseph did, in his own name, but as agent as aforesaid, and on behalf of John, sign the agreement. The evidence being objected to, was rejected by the court below, ALDERSON, B., sitting.

At the trial of the case on appeal in the exchequer, CAMPBELL, the attorney-general, arguing the case for the defendant (p. 30), contended that the parol evidence was properly rejected, because "its object was to prove a trust of lands created by parol, contrary to the statute of frauds. He said, if Joseph had the legal estate in him, it could not be proved by parol that he held as trustee, and if his interest was only equitable, the same objection applies, it being an interest in land. Nor can it make any difference whether the party is called a trustee or an agent. There is not indeed any proof that he did sign as agent. The contract is simply executed by Joseph Fox, in his own name; and the attempt is, in effect, to show by parol that he made the agreement as trustee."

LORD ARBINGER, C. B.: "Agency would not make him a trustee in the sense in which you state it." PARKE, B.: "May not a man be authorized by parol to make an executory agreement for another?" TINDALL, C. J.: "As an auctioneer is made by parol the authorized agent of the parties to the sale."

The case was decided in favor of the plaintiff upon other grounds, which rendered it immaterial to pass upon the bill of exceptions,

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involving the admissibility of the parol testimony. But TINDALL, C. J., in delivering the opinion, said: "*We have no hesitation in declaring that the learned judge was wrong in rejecting the evidence which was offered to prove that Joseph Fox entered into the agreement of purchase, stated in the bill of exceptions, as the agent of John Fox.*"

The decision is entitled to great weight, as the case was heard and decided by all the judges of England, except Lord DENMAN, who was absent; and seems to us to be conclusive authority in favor of the admissibility of the parol evidence here relied on to prove the contract of agency under which the plaintiff made the purchase.

We think this case is clearly distinguishable from *Lamborn v. Watson*, 6 H. & J. 252, and *Duvall v. Peach*, 1 Gill, 172, and the class of cases to which they belong. *Duvall v. Peach* seems to us to be altogether inapplicable.

The point there decided, as correctly stated in *Brown on Statute of Frauds*, 273, was that "an agreement to establish the title to land in any party is equivalent to an agreement to sell him the land, and accordingly it was held in that case that an engagement to break down a certain alleged title, under which a third party claimed adversely, or in any way to perfect the title in the promisee, is within the statute."

In *Lamborn v. Watson* the contract which formed the basis of the suit was simply a contract that Watson should buy, and that Lamborn should have the privilege to redeem or re-purchase at the same price. This was the effect of the verbal contract.

In form the agreement was that Watson should bid off the land, and the intention seemed to be thus to prevent or baffle the sale, so as to give time to Lamborn (the defendant in the execution) to pay the judgment debt. Judge BUCHANAN speaks of it as "an expedient to prevent an actual sale in order to gain time which was not altogether free from exception."

The agreement was certainly not one constituting Watson as Lamborn's agent to buy for him, thus making Lamborn the real purchaser.

If such had been the agreement, there is authority for holding that Lamborn might have succeeded in a court of equity, in preventing his agent from defrauding him, and have secured the benefit of the purchase, as was decided in *Taylor v. Salmon*, 4 Myl. & Cr. 134; *Lees v. Nuttall*, 1 Russ. & Myln. 53, affirmed in H. of L. 2 Myl. & K.

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819; *Giddings & Coleman v. Eastman & Wife*, 5 Paige's Ch. 561; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Brown v. Lynch*, 1 Paige's Ch. 147.

But looking at the facts of that case as they were shown by the evidence, and viewing the agreement according to its legal effect, and as parties must be understood to intend the legal consequences of their own acts, it followed of course, that if Watson bid off the land at the sheriff's sale, the effect would be, not to prevent a sale, but to consummate it, as a sale to Watson, and then the effect of the verbal agreement, if allowed, would be to bind Watson to re-sell to Lamborn at the same price; or to create a trust in him for Lamborn's use, which, under the statute, could only be proved by writing; and thus the case fell directly within the principle of *Bartlett v. Pickersgill*, 4 East (before cited), and other cases of that kind, among which we may cite, *Hall v. Shultz*, 4 Johns. 240; *Sherrill v. Crosby*, 14 id. 358; *Van Alstine v. Wimple*, 5 Cow. 162; *Smith v. Burnham*, 3 Sumn. 435; *Hogg v. Wilkins*, 1 Grant's Cases, 67.

In the case last cited, Judge BLACK draws a distinction between the case then under consideration, and the case of a purchase of land by an agent employed for that purpose, and says that the agent might be compelled to convey, upon being refunded the price he paid.

We are of opinion, both upon reason and authority, that the parol evidence was admissible for the purpose of proving the employment of the plaintiff by the defendants as their agent; and that the court below erred in its instructions to the jury, contained in the third bill of exceptions; and in refusing the first, second, third and fourth prayers of the plaintiff.

This view of the case renders it unnecessary to express any opinion upon the questions raised by the first and second bills of exceptions

MILLER, J., delivered a dissenting opinion.

Judgment reversed and new trial ordered

Jones v. Jones.

JONES, appellant, v. JONES.

(38 Md. 447.)

Marriage between slaves — ratification of.

A marriage between slaves, void at the time, is made valid by ratification of the parties after they become free, and their children have heritable blood.

PETITION by George W. Jones, Joshua A. Jones, Sarah Ann Robinson, Ellen McComas and Georgianna Russell, alleging that they were the only children of David Jones, who was the brother of Andrew D. Jones, deceased, who died intestate, leaving a widow but no other heirs or next of kin except the petitioners, and praying that the administratrix of Andrew D. Jones, deceased, be cited to settle her accounts and that their proportion of the intestate's estate be divided among them according to their several interests. The widow of the intestate, who was also the administratrix, answered, denying the relationship of the petitioners to the intestate. The court below decided that the petitioners were the legitimate issue of David Jones, and as such, entitled to a portion of the estate of Andrew D. Jones, and decreed such distribution. The administratrix appealed. The other facts are stated in the opinion.

William H. Dawson and G. H. Williams, for appellant.

William Shepard Bryan, for appellee.

GRASON, J. The main questions arising upon this appeal are, whether the appellees are nephews and nieces of Andrew D. Jones, deceased, and, if they are, whether they are entitled to a distributive share of his estate? After a careful examination of the evidence in the record, we are satisfied that Andrew D. Jones and David Jones were the sons of Kate Jones, and brothers, and that the appellees are the children of David and Hannah Jones. Without entering, in this opinion, into a detailed review of the evidence, it is sufficient to say that it leaves no doubt that David Jones was married, while yet a slave, to Hannah Williams, a free woman, and that some of her children were born before David became free and some after-

ward, and that David and his brother Andrew were both manumitted by Margaret Gardner by deeds, both of which were executed on the 10th of November, 1814, and recorded on the 26th of the same month — David's freedom to commence five years and Andrew's six months thereafter. David and Hannah lived together as man and wife, and acknowledged and treated each other as such, and were so recognized by all who knew them, long after David's emancipation, and up to the time of Hannah's death, which appears to have taken place about thirty years ago; and David died twelve or fifteen years ago. Andrew died in August, 1870, leaving the appellant his widow, but no child and no relatives other than the appellees, who are his nephews and nieces. They are therefore entitled to their distributive share of his estate, unless they are incapable of inheriting by reason of their father and uncle having been at one time slaves. It has been urged in argument that the marriage of David and Hannah was void by reason of its having taken place while David was a slave, and that therefore their children had no heritable blood; and several authorities were referred to in support of this proposition. Among these is an opinion of Daniel Dulaney, Esq., given in 1767, and contained in 1 H. & McH. 559. The facts upon which that opinion was based were, that A, a mulatto slave, obtained his freedom and purchased land in fee, and died intestate and without issue. B, also a mulatto slave, and brother of A, obtained his freedom after the death of A, and died, leaving children by a slave woman, whose freedom he had purchased — some of the children having been born during the slavery of their mother and purchased with her, and some having been born afterward — and the question was, whether these children could inherit the property of which their uncle died seized, or whether it escheated to the State. It will at once be seen from the statement of the facts, that B could not inherit, nor, after his death, could his children; because at the time of A's death, B and his children, then born, were all slaves, and there being no one then in existence capable of inheriting the property escheated. It does not appear from the facts stated in the opinion, that B and the mother of the children had ever been married, and this fact alone, if there had been no other impediment, would have been sufficient to prevent the children from inheriting A's property. In the other cases referred to by the appellant's counsel, the parties claiming the property were slaves at the death of the party from whom they claimed to inherit, and of course could not take the

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property. But in the case before us, the appellees were born of a free woman, and were themselves free from their birth and capable of inheriting. Their father, it is true, had been a slave at one time, but his slavery did not affect his children's condition; and he became free fifty years before Andrew's death. Mr. Dulaney argues that a slave could not marry because he was a slave, and a contract of marriage would be an invasion of the master's rights. But ten years after his opinion was prepared, by the act of 1777, ch. 12, § 11, the legislature authorized slaves to marry with the assent of their owners, and, whatever the law may have been in this respect before, they could lawfully marry thereafter. Although the marriage would not confer civil rights upon them, and in no manner change or affect the relation of master and slave, yet it was legalized, and consequently the issue would be legitimate. As the proof is sufficient to satisfy us that David and Hannah Jones were married, we must presume, nothing appearing to the contrary, that they were married with the consent of the mistress of David. When he afterward acquired his freedom, certain civil rights vested in him, as a consequence, such as the right to acquire by purchase or inheritance, and to hold and dispose of property. Upon his death the property of which he might then be seized or possessed would descend upon his children, they being free.

Mr. Dulaney further argues that the validity of a marriage depends upon the immediate effect of its celebration, and that, if it is not valid then, it could not be made good by the subsequent accidental circumstance that the parties acquired their freedom, and to illustrate the argument, he puts the case of a man marrying a woman while he had a wife still living, and says that the accidental circumstance of the first wife dying would not make the second marriage valid. It is true that in such a case the second marriage would not be made valid by the death of the first wife, because a marriage under such circumstances is a great moral wrong, and a high crime under the law. But there are cases in which marriages, contracted between parties not capable of contracting at the time of the marriage, are made valid by the subsequent ratification of the parties, as in the cases of lunatics and infants, and that without any other or new celebration. *Cole v. Cole*, 5 Sneed, 63; *Wightman v. Wightman*, 4 Johns. Ch. 345; 1 Blackst. Comm. 436. We think that the same law should apply to cases of marriages between slaves, who ratify the marriage after they become

free. Bishop, in his work on Marriage and Divorce, vol. 1, § 162, says, in referring to the case of *Howard v. Howard*, 6 Jones (N. C.) 235: "In the facts of this case there is involved the particular matter upon which the writer of these volumes deems that the decision, in all such cases, ought in principle to turn. If, after the emancipation, the parties live together as husband and wife, and if, before emancipation, they were married in the form which either usage or law had established for the marriage of slaves, this subsequent mutual acknowledgment of each other as husband and wife should be held to complete the act of matrimony, so as to make them lawfully and fully married from the time at which this subsequent living together commenced." No legal marriage could be contracted by slaves under the civil law, yet it recognized a relation between them, which was termed *contubernium*, and, although this relation conferred no civil rights upon the parties, yet, when they became free, their children being free, although born in slavery, could inherit from each other and from their parents. Code Justinian, lib. 3, tit. 7, p. 32.

After David Jones became free, he continued to live with Hannah as his wife to the time of her death, they recognizing and treating each other as husband and wife, and taking their children to the church which they were in the habit of attending, to be baptised. We should be extremely reluctant to hold a marriage, which had taken place with the consent of the owner of slaves, and under the sanction of a statute, and thus ratified after they became free, to be void, and the issue of it bastards, merely because the parties to it were slaves at the time it was celebrated, and thus prohibit them from inheriting property from their parents or from each other after they became free. There is no doubt that the appellees are capable in law of inheriting from their uncle Andrew D. Jones, and are entitled to a distributive share of his estate.

The remainder of the opinion disposes of unimportant questions of evidence.

Decree affirmed.

Dugan v. Anderson.

DUGAN, appellant, v. ANDERSON.

(36 Md. 567.)

Contract — breach of — immediate right of action.

Plaintiff entered into defendant's employ, under a contract to serve as clerk till a certain time, and then to become a partner. Before that time arrived, defendant discharged plaintiff and refused to receive him as a partner, and plaintiff immediately brought action for a breach of the contract. *Held*, that the contract was entire, and the action not prematurely brought. (See note, p. 514.)

. THIS was an action brought by the appellee against the appellant, to recover for the breach of a contract. Verdict and judgment for the plaintiff. Defendant appealed. The opinion states the case.

T. Wallis Blakistone and *S. Teackle Wallis*, for appellant. The contract was separable and apportionable, and the appellee could not recover for a breach of that part of it, which was not to be and could not be performed until after the action was brought. 2 Pars. on Cont. 517, 521; 2 Smith's Lead. Cas. 55 *et seq.*; *Rodemer v. Hazlehurst*, 9 Gill, 294; *Kercheval v. King*, 44 Mo. 401; *Taylor v. Laird*, 25 L. J. (Exch.) 329; Sedg. on Dam. 258 (*marg.* 229); *Philpotts v. Evans*, 5 M. & W. 475; *Ripley v. McClure*, 4 Exch. 359; *Frost v. Knight*, 5 Exch. (L. R.) 322; *Greenway v. Gaither*, Campbell's C. C. 227.

Charles Marshall, for appellee.

MILLER, J. We have to deal in this case simply with the questions of law presented by the two exceptions contained in the record. The jury have passed upon the conflicting testimony.

The suit was instituted by the appellee against the appellant on the 5th of January, 1871, and was tried in October of that year. No question arises upon the pleadings. The plaintiff's ground of action as presented by his first prayer is, in substance, that in the summer of 1870, a contract was entered into between the parties, by which the defendant agreed to employ the plaintiff as clerk in his store at a salary of not less than \$1,500 per annum until the 1st of March, 1871, and then to receive him as partner in his business for

one year certain, and allow him one-third of the profits; that in pursuance of this promise and agreement by the defendant, the plaintiff gave up his then situation and employment, in which he was receiving \$2,000 per annum, and entered into the service of the defendant as proposed, and continued therein until discharged and removed therefrom by the defendant; that the plaintiff, before the institution of this suit, offered to continue to serve the defendant until the 1st of March, 1871, and then to become a partner in the business under the agreement aforesaid, but the defendant, before suit brought, denied there was any such agreement between himself and the plaintiff, and refused to permit the plaintiff to continue in his service until the 1st of March, 1871, and required him to leave his employment, and forbade him to be and remain in the store in which said business was conducted, and denied he was entitled to become a partner therein from that date, and refused to receive him as such when that time should arrive. The prayer, after leaving to the jury to find these facts, and also that the defendant did not at any time before the 1st of March, 1871, retract his action toward the plaintiff and offer to receive him again into his employment until that period, and then to admit him as partner in the business as aforesaid, asserts, as a legal proposition resulting therefrom, that the plaintiff was entitled to institute the suit at the time it was brought, and to recover as for a breach of the *entire contract* above required to be found.

The defendant's first prayer denies the right of the plaintiff to recover damages for the alleged refusal of the defendant to take the plaintiff into partnership on the 1st of March, 1871, under the contract alleged and sought to be set up, because the action was instituted prior to that time. The proposition thus announced by the defendant's prayer is a denial of the law of *Hochster v. De La Tour*, 20 Eng. L. & Eq. 157, and of the English cases that have followed and sanctioned that decision. That case was decided in 1853, and gave rise to a controversy in the English courts in which their most eminent judges have participated. It may be doubted whether the controversy is yet ended and the law of England in respect thereto finally settled. No decision upon the subject has yet been made by the house of lords. The latest decision in the highest court to which the question has been taken, is that of *Frost v. Knight*, decided in the exchequer chamber on the 8th of February of the present year. That case was heard before and decided by Chief Jus-

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tice COCKBURN and BYLES, KEATING and LUSH, judges, who, without dissent, reversed the judgment of the court of exchequer by Chief Baron KELLY and CHANNELL, B., and sustained and affirmed the law of *Hochster v. De La Tour*.

The principle of this decision in cases to which it has been held applicable, is, that there is a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. It is said the promisee has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for the performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, the promisee may in many cases avert, or at all events materially lessen the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

This in substance is the reasoning upon which such actions have

been sustained by the English courts. Most masterly arguments have been made at bar in this case, founded both in reason and authority, urging us on the one hand to adopt, and on the other to repudiate this as the law of Maryland. All the authorities discoverable by the research of eminent counsel have been presented, reviewed and pressed upon our attention. But we do not feel ourselves justified in deciding a question of this importance, unless it be clearly presented by the record, and becomes essential to the determination of the very case before us. When so presented we shall be prepared, as it will be our duty, to determine it. But in the present record there is a question beyond and outside of *Hochster v. De La Tour*, that is decisive of this case, and upon which in our opinion its decision must rest. The law of *Hochster v. De La Tour* relates simply to cases where there is a pre-contract for future services, or the performance of some act or duty at a future period, and where performance cannot be commenced, and was not by the contract contemplated, until that period arrives, and where the promisor prior to that time announces his intention not to abide by the contract. But in this case performance of the contract had been commenced and the plaintiff was discharged by the defendant and prevented from further executing it; and suit was not brought until after this discharge, though before the time for performance of that part of the contract relating to the partnership had arrived. The defendant broke up the contract while it was being performed by the plaintiff, and the action was not commenced until after this breach. In this respect there is a broad distinction between the case before us and that of *Hochster v. De La Tour*. It is an ancient and familiar rule of law that only one action can be maintained for the breach of an entire contract, and the judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding. Sedgwick on Damages, 224. But the difficulty is to determine in what cases the contract is entire. In determining this question the courts must be guided by a respect to general convenience, and by the good sense and reasonableness of the particular case. Where an agreement embraces a number of distinct subjects, which admit of being separately executed and closed, the general rule is that it shall be taken distributively, and each subject be considered as forming the matter of a separate agreement after it is so closed. In one sense the contract before us was in its nature and terms separable and apportionable, that is, its separate

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parts, the services as clerk, and the partnership, were capable of separate execution, and must have been performed consecutively in order of time. But in respect to the intention of the parties gathered from the facts presented by the plaintiff's prayer, it was in our opinion to be entire and indivisible. The consideration for the plaintiff's action in entering into it was not merely that he should be employed until the 1st of March, 1871, at a salary, but that he should be so employed *and* be taken as a partner at that time for a year certain. The latter was as much a part of the consideration promised him for entering the service of the defendant as the former, and the conduct of the defendant as stated in the prayer, in our judgment, constituted a breach which gave an immediate right of action and entitled the plaintiff to recover damages, in the language of his prayer, as for a breach of the entire contract.

Such, in our opinion, is the true construction of this contract and the right of the plaintiff ensuing upon its alleged breach. The case bears a close analogy to that of *Masterton & Smith v. The Mayor, etc., of Brooklyn*, 7 Hill, 61, where the plaintiffs contracted, in January, 1836, with the defendants to furnish all the marble necessary for a certain public building then about to be erected by the defendants for which they were to pay a specified sum in installments as the work progressed. The plaintiffs entered into the performance of this contract and furnished marble thereunder until July, 1837, when the defendants suspended operations on the building and refused further to perform on their part. The contract could not have been fulfilled by the plaintiffs, even if they had been allowed to prosecute to work without interruption, before 1842. In 1840 they brought an action against the defendants founding it upon the breach which occurred in 1837. The action was not only sustained as well brought at that time, but the plaintiffs were allowed to recover in respect to so much of the contract as remained wholly unperformed at the time of the breach, the difference between what the performance would have cost them and the price the defendants had agreed to pay, estimating the former by the price of labor and materials at the time of the breach. All the judges held that the contract being broken before the time of full performance the plaintiffs might elect to consider it in that light, and were not bound to wait till the period had elapsed for the complete performance of the agreement nor to make successive efforts of performance in order to recover all their damages, but might regard the contract as broken

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up so far as to absolve them from making further efforts to perform and recover full damages as for a total breach. So in *Clossman v. Lacoste*, 28 Eng. L. & Eq. 140, where an agreement was made that the plaintiff should enter into the employment of the defendant for the sale of wines on commission, the agreement to continue for five years, and the defendant guaranteeing the plaintiff £600 *per annum* as a *minimum* revenue from the business during the continuance of the agreement, it was held that the plaintiff might sue in any one year during the continuance of the agreement for breaches in any former year, but if there was an *entire dismissal* from the service before the expiration of the agreement, the plaintiff ought to include in one action the *whole gravamen* he would suffer by such breach of contract. The present case, in our judgment, falls within the rule of these decisions and others of similar import, and the law of *Hochster v. De La Tour* is not necessarily involved in its determination. It follows there was no error in the rulings rejecting the defendant's first prayer and granting the first prayer of the plaintiff, in so far as the legal propositions they contain are concerned.

[The remainder of the opinion relates to unimportant questions of evidence.]

NOTE. — See *Burtis v. Thompson*, 1 Am. Rep. 416 and note; also *Holloway v. Griffith*, 7 Id. 203. — REP.

SCHUCHARDT, appellant, v. HALL

(30 Md. 590.)

Bill of exchange — acceptances.

Defendants drew a bill of exchange against a cargo and indorsed and delivered to plaintiffs the bill and also the bill of lading of the cargo, as collateral security for the acceptance and payment of the bill, authorizing them, in case they thought it necessary, to sell the cargo and apply the proceeds to the payment of the bill. The drawee refused to accept the bill without a delivery of the bill of lading. *Held*, that presentment and notice of non-acceptance were excused.

THE opinion states the case. The defendant had a verdict and judgment below, and defendant appealed.

Stewart Brown & G. W. Brown, for appellant.

Alexander H. Hobbs, for appellee.

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BARTOL, C. J. This suit was brought by the appellants, bankers of New York, against the appellees, as drawers of a bill of exchange, dated May 22, 1868, at sixty days sight, on Joseph and Charles Sturge, Birmingham, England; drawn against a cargo of red wheat, per brig "Ocean Belle," and payable in London.

Upon the day of the date of the bill, the appellees sold and indorsed the same to the appellants, and on the same day, by letter of hypothecation, "lodged the bill of lading for the cargo with the appellants as collateral security for the acceptance and payment of the bill, and authorized the appellants, in case they thought it necessary, to place said red wheat on arrival in the hands of the appellants' brokers for immediate sale, and to apply the proceeds in or toward payment of the bill."

The bill of exchange was sent by the plaintiffs in due course of mail, together with the collateral documents, to the Union Bank of London, and was by it transmitted to the "Birmingham and Midland Bank," Birmingham, to procure acceptance. The drawees, Joseph and Charles Sturge, declined to accept the bill, considering themselves not bound to do so by their contract with Hall & Loney, the drawers, unless they were put in possession of the bill of lading of the cargo against which it was drawn. The Union Bank of London, the agent of the plaintiffs, considering that by the letter of hypothecation, it was entitled to hold the bill of lading as "collateral security for the *payment of the draft*," retained possession of the same.

The bill was protested for non-acceptance, and notice thereof was transmitted to the defendants, the drawers.

Upon the dishonor of the bill, the cargo was sold under the direction of the London agents of the appellants, and the net proceeds applied toward payment of the amount of the bill; but being insufficient, this suit was brought to recover the deficiency and statutory damages, after notice of all the facts to the appellees, and demand of payment from them.

At the trial of the case, one prayer was offered by the plaintiffs which was rejected, and an instruction was given to the jury "that there was no sufficient evidence in the case, from which they could find due presentment for acceptance of the bill of exchange offered in evidence, and that the plaintiffs were not entitled to recover."

It appears from the proof that the presentment was made by the *notary's clerk* to a clerk in the employ of Messrs. Joseph and Charles

Sturge, at their counting house or place of business. The clerk of the notary was competent to act, as was decided in *Munroe v. Woodruff & Robinson*, 17 Md. 159, and *Fulton v. Maccracken*, 18 id. 528. But it is objected that the presentment ought to have been made to the Messrs. Sturge, and that a presentment to their clerk was not sufficient. But this depends upon whether the clerk was their agent in the premises duly authorized to accept or refuse. Such authority may be proved by parol; and "the proof may, as in other cases of agency, be circumstantial and indirect." 1 Pars. on Bills and Notes, 349; *Nelson v. Fottrell*, 7 Leigh, 179; *Stainback v. The Bank of Va.*, 11 Grattan, 260.

We think that in this case there was evidence, competent and sufficient to be submitted to the jury to prove, that the clerk of the drawees was authorized to refuse acceptance of the bill; and therefore the instruction given to the jury was erroneous.

But in the view we have taken of this case, it is not important to discuss this question further, because we are of opinion that under the circumstances stated in the testimony, the defendants were not entitled to require formal presentment for acceptance and notice of non-acceptance of the bill of exchange.

There can be no doubt of the correctness of the appellants' position, that the effect of the delivery of the bill of lading to them, together with the letter of hypothecation as collateral security, both for the acceptance and payment of the bill of exchange, was to entitle them to hold the same till the bill should be paid; they were not legally bound to surrender the security, upon the acceptance of the bill, and to trust to the personal liability of the acceptors for its payment. This exonerated the drawees from their obligation to accept; because under their contract with the defendants, the latter were authorized to draw, only against the *cargo of wheat* to be shipped by the "Ocean Belle," and they were therefore not bound to accept without the delivery to them of the bill of lading. *Allen v. Williams*, 12 Pick. 297; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Craig v. Sibbett*, 15 Penn. 238; *Shepherd v. Harrison*, 4 L. R. (Q. B.) 496.

Thus it is clear that the defendants, after drawing the bill of exchange, placed it in the power of the plaintiffs, and gave them the legal right to retain in their own hands until the maturity of the bill, and to withhold from the drawees, the muriment of title

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to the shipment, without the receipt of which the latter were under no obligations to accept the bill.

The question is, whether this state of facts is sufficient to dispense with the necessity of a due presentment and notice of non-acceptance?

In *Rhett v. Poe*, 2 How. 457, it was held that "where a drawer of a bill has no right to expect the payment of it by the acceptor; where, for instance, the drawer has withdrawn, or intercepted funds which were destined to meet the bill, or its payment was dependent upon conditions which he must have known he had not performed, such drawer cannot claim to be entitled to notice of the non-payment of the bill."

The same rule applies to the non-acceptance of a bill. *Eichelberger v. Finley*, 7 H. & J. 386.

The rule of law applicable to this subject has been laid down by this court in *Orear & Berkley v. McDonald et al.*, 9 Gill, 350.

The result of the decisions is, that the right of notice of dishonor does not turn absolutely upon the fact, whether the drawers of the bill of exchange actually had funds in the hands of the drawees; but whether they had a reasonable expectation that the bill would be accepted and paid. To quote the language of the court in the case last cited: "If the drawers at the time when the bill should have been presented, had the right to expect, reasoning upon the state of facts connected with the transactions as they then existed between the drawees and themselves, that their bill would be honored, they were entitled to demand and notice." We refer also to *Claridge v. Dalton*, 4 M. & S. 230; *Kinsley v. Robinson*, 21 Pick. 328, and *Dickens v. Beal*, 10 Pet. 577.

Applying the rule deduced from these cases to the one before us, we are of opinion that by the course pursued by the appellees, in parting with the bill of lading and pledging it as collateral security to the appellants, both for the acceptance of the bill of exchange and for its *payment* at maturity, they violated their contract with the drawees, and had no reasonable ground to expect that they would accept the bill. Such a proceeding was equivalent to intercepting the fund upon which the bill was drawn, and brings the case within the principle of *Rhett v. Poe*, 2 How. 457.

There is no doubt that in this case the appellees acted in good faith, and that they honestly expected or hoped that the bill would be accepted; but the rule of law requires that they should have had

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a reasonable ground for their expectation ; that is, that it should have been based upon a promise or engagement of the drawees to accept, or an authority derived from them to draw the bill ; and a performance of the contract or condition on the part of the defendants upon the performance of which the acceptance of the bill depended.

They must be charged with knowledge of the legal consequences of their own acts, and cannot be heard to say that they were ignorant of the construction and effect of their contract of hypothecation. And having thus failed to comply with their contract by transmitting to the drawees the muniment of title to the cargo, against which alone the bill was drawn, they cannot be said to have had such reasonable grounds to expect that the bill would be honored, as to entitle them to insist upon due presentment and notice of its non-acceptance.

Being of opinion that the circuit court erred in its instruction given to the jury, and that the appellants are entitled to have an instruction given to the jury in conformity with the views herein expressed, we reverse the judgment and order a new trial.

Judgment reversed and new trial ordered.

STEWART, J., dissented.

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(37 Md. 1.)

Contract. Sale of after acquired goods.

Action of trover against executors for goods claimed by plaintiffs under a verbal contract whereby the testatrix, for a valuable consideration, agreed to sell and convey to them all the personal property she then had and all that she might thereafter acquire and die possessed of. *Held*, (1) That the contract was inoperative to pass title to the subsequently acquired property, and that plaintiffs could recover for the conversion of such goods only as testatrix had when the contract was made ; (2) That the burden of proof was on the plaintiffs to show which these were.

THE opinion states the case.

J. H. Gordon, for appellant.

Wm. Brace, Jr., for appellee.

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MILLER, J. The appellants, Amon and Edward Wilson, and the appellee, James Wilson, were the sons of Susannah Wilson, who died in February, 1867, leaving a will executed in December, 1862, by which, after some specific bequests of personalty, she devised and bequeathed all the rest and residue of her estate to her three sons above named, and appointed James her executor. The latter accepted the trust, and proceeded at once to discharge it, by procuring letters testamentary, taking possession of the personal property, returning an inventory of the same, delivering over the specific legacies, selling the residue under order of the orphans' court, and passing his accounts, including one distributing the balance after payment of debts and legacies, to the three residuary legatees named in the will. After such administration of the personal estate, Amon and Edward brought this suit against James. The declaration contains two counts, one in *trespass* for the wrongful taking, and the other, in *trover*, for the conversion of all the goods and chattels described in the inventory. Each count contains the averment essential in such actions, of property in the plaintiffs at the time of the asportation and conversion. The defendant besides *non cul.* pleaded other pleas, averring that his testatrix was in possession of this property as her own at the time of her death, and relying upon his full administration of the same as before stated. To these pleas, the plaintiffs filed two replications as follows:

1st. That in the year 1859 their mother, Susannah Wilson, agreed with the plaintiffs that in consideration that they would permit her to use, occupy and enjoy certain lands and tenements belonging to them, but then in her possession, during her life, that they should have and receive and be entitled to as their own, all the personal property she then had, and the increase thereof, and the profits of said real estate, except so much as should be necessary for her support, *as well as all the personal property she should have and receive during her life-time, and be possessed of at the time of her death*; that she would take good care of all said property during her life, and pay all taxes and expenses of the same, during that period, and that the same should be delivered over to them at her death; and that the plaintiffs on their part, and in performance of said agreement, did permit the said Susannah to use, occupy and enjoy all said real estate, the lands and tenements aforesaid, for and during her natural life, and did every thing on their part to be done and performed according to said agreement, of all

which matters the defendant had notice: and the plaintiffs further aver *that all the property in the declaration mentioned was and became the property of the plaintiffs by virtue of said agreement, and the performance thereof by them;* and they were entitled to have and receive the same at the death of said Susannah, but the defendant well knowing all the matters and things aforesaid, refused to permit the plaintiffs to have the said property, but seized and appropriated the same, after the death of said Susannah, as is charged in said declaration.

2d. That the said Susannah in her life-time, that is to say, on the 4th of March, 1859, in consideration that the plaintiffs would execute a deed conveying to her certain lands then belonging to them, and then in her possession for and during her natural life, she agreed that she would sell and convey to the plaintiffs all the personal property then belonging to her and the increase and profits thereof, *and all personal property afterward acquired by her*, except so much as might be necessary for her comfortable support during life, and that all the property then owned by her, *and afterward acquired as aforesaid*, should be delivered to the plaintiffs at her death, and that they in consideration of this agreement, and of the love and affection which they had for their said mother, did execute said deed, and did permit her to hold and possess said real estate during her natural life, *by means of which said agreement, and the performance thereof by the plaintiffs, they became entitled to all the property mentioned in said declaration*, of all which matters the defendant had notice; yet the defendant refused to permit the plaintiffs to have and receive any part of said property after the death of said Susannah; but seized and appropriated the same, as stated in said declaration.

The averments of these replications were traversed by the defendant, and on issues thus made up, as well as upon issue joined on the plea of *non cul.* the case was tried and resulted in a verdict and judgment for the defendant. This appeal is taken by the plaintiffs, and presents for review the rulings at the trial to which they excepted. These are the court's qualification of their seventh prayer, the granting of the defendant's sixth, and the rejection of the plaintiffs' fifth prayer, and they will be considered in this order.

By their seventh prayer, the plaintiff asked the court to instruct the jury that if they find from the evidence in the cause that it was agreed between the plaintiffs and the said Susannah, in her life-time, that they should execute the deed of the 4th of March, 1859, offered in evidence, and that, in consideration thereof, the plaintiffs, upon

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her death, were to be, and to become the owners of all the personal property she might die owning and possessing, then if the jury further find, that in pursuance of this agreement the plaintiffs executed the said deed, and that she possessed, used and enjoyed the said real estate during her natural life, and shall further find that the property in controversy was, at the time of her death, her personal property, then the plaintiffs are entitled to recover *in this action* the value of said property, provided the jury further find the defendant took and sold the same. The court granted this prayer with the following qualification: "provided that the plaintiffs can only recover for such property as the said Susannah may have been in possession of at the date of said contract or contracts, set out in the replications of the plaintiffs, and the increase of said live property, if they find such contract or contracts were entered into by and between the plaintiffs and the said Susannah." This refers us to the contract set out in each replication.

Assuming either of these agreements to be valid for any purpose, it may be treated as a contract of sale, effective, at the time it was made, to pass, as between the parties, the legal title to so much of the property professed to be sold, as the vendor had the power then to dispose of by sale. In this view, the parties occupied the relation of vendor and purchasers, and for a valuable consideration the vendor professed to sell not only all the personal property she then had, but all she might thereafter acquire, and die possessed of, retaining, however, the use and enjoyment of the whole during her life.

With respect to the property she then had, and the increase of such of it as was live property, the contract contains reservations express or implied, similar to those of the deed in *Hope v. Hutchins*, 9 G. & J. 77, where the court held it was clear the legal title passed immediately upon the execution of the instrument, and that nothing more than a mere usufructuary interest or right of enjoyment was reserved to the grantor during her natural life. Upon the authority of that case, the plaintiffs' title to such property might be sustained if the contract were free from objection on other grounds. It is not, however, with that part of the contract we have to deal, but with that clause of it which professes to pass title to the property which the vendor might thereafter acquire during her life. Is that clause operative to pass the legal title to such property, so as to enable the plaintiffs to maintain trespass or trover for its asportation or conversion? This question has been answered

by our predecessors. Upon an able and elaborate review of the authorities, it was decided in *Hamilton v. Rogers*, 8 Md. 301, that a clause in a mortgage of goods in a store conveying not only those then in the store, but whatever might be therein at any time in the course of the mortgagor's business, was, as to subsequently acquired goods, inoperative for the purpose of enabling the mortgagee to maintain an action at law against a party seizing them. The court in that case recognize and adopt the maxim of the common law, that a man cannot grant that which he hath not actually or potentially at the time of the grant. If such a clause in a deed or other written instrument be thus ineffectual, it is hardly necessary to say it can have no greater effect when forming part of a verbal contract of sale. How a court of equity would deal with a clause of this character in a mortgage or bill of sale is not a matter now to be determined, and hence we have nothing to do with law as established in *Pennock v. Coe*, 23 How. 117, *Langton v. Horton*, 1 Hare, 549, and other cases to the like effect. The immediate question we are now considering is, in our opinion, conclusively settled by the decision in *Hamilton v. Rogers*, and cannot be controlled or affected by anything that fell from the court in delivering its opinion in *Hannon's Ex'rs v. Robey*, 9 Gill, 440.

It was suggested by TINDALL, C. J., in *Lumm v. Thornton*, 1 Man., Gr. & Scott, 379, one of the cases relied on in *Hamilton v. Rogers*, that a deed might be so framed as to give the grantee a power of seizing the future personal goods of the grantor as they should be acquired by him and brought on the premises, and the effect of such power has been determined by subsequent decisions. Thus, in *Congreve v. Evetts*, 10 Exch. 298, a party in order to secure a debt had conveyed by bill of sale all his household goods, crops of grain, live stock, implements of husbandry and the whole of his personal estate in and about his dwelling-house and farm, and the deed declared it should be lawful for the grantee at any time, either in the life-time of the grantor or after his death, to seize and take possession of the property conveyed, and of all such stock, crops, implements and other effects which should or might from time to time be substituted in lieu of those assigned or any part thereof, or which should for the time being be found on or about the premises, and sell the same at public or private sale for payment of his debt, the balance of the proceeds, if any, to be retained and paid over to the grantor. Some time afterward the grantee, by virtue

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of this authority, seized and took possession, among other things, of certain crops of grain then growing upon the land, but which had not been sown until after the execution of the deed. The day after this seizure a prior judgment creditor of the grantor caused a *fiery facias* to be issued on his judgment and delivered to the sheriff, who thereunder seized and sold the crops thus in possession of the grantee and paid over the proceeds to the plaintiff in the judgment. The grantee thereupon brought an action at law against the execution creditor for the value of the crops thus levied upon and sold by the sheriff. It was conceded the future crops did not pass by the bill of sale, but the plaintiff contended that having actually taken possession of them before delivery of the writ to the sheriff, he was lawfully in possession, and could bring an action against any one for taking them, and that his title ought to prevail against that of the defendant. This point was decided in his favor, and the court say: "If the authority given by the bill of sale *had not been executed*, it would have been of no avail against the execution." It gave *no legal title*, nor even equitable title to any specific goods; but *when executed* not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of a chattel by delivery with his own hands, or point it out and direct the creditor to take it, or tell him to take any he pleases for the payment of his debt by the sale of it, the effect *after actual possession* is the same." In the still later case of *Carr v. Acraman*, 11 Exch. 566, the deed of mortgage contained a similar power, but the grantor subsequently assigned all his property to trustees for the benefit of his creditors, and *after this* the grantee took possession under the power of all the effects on the premises. The assignment was adjudged an act of bankruptcy, and the assignees in bankruptcy then took and sold the property thus in possession of the mortgagee. The latter then brought *trover* against the assignees, and the question was, could he recover for the property placed on the premises subsequently to the date of his mortgage. The court held that the property in question would have passed to the plaintiff if he had seized it whilst it was the property of the bankrupt, and before he conveyed it to the trustees for the benefit of his creditors, but that that conveyance had defeated his title, and MARTIN, B., said: "The power of the plaintiff to seize future

property was a *license*, and the conveyance by the bankrupt to the trustees operated as a revocation of that license." Other authorities, both English and American, might be cited to the effect that a deed or bill of sale may confer a license or authority to seize subsequently acquired property, which, when duly executed, will inure as a grant and vest a title good not only as between the parties, but against third persons claiming under the grantor, but which will nevertheless be defeated by a sale to a *bona fide* purchaser, or other transfer, before the power has been acted upon. But even if this court should adopt the law of these cases, and hold it applicable as between the parties to a verbal contract of sale like the present, we fail to find any such power in either of the contracts before us. Neither of them professes to authorize the plaintiffs themselves to seize and take possession of all her personal estate upon the death of their mother. But suppose either contract to be susceptible of a different construction and to contain a license or authority of this character, it was undoubtedly a power to be exercised immediately upon the death of the vendor. It was incumbent upon the plaintiffs then to have executed it by taking actual possession. This was essential to the maintenance of their present action for the after-acquired property. But nothing of the kind is shown to have been done by them; on the contrary, it appears the defendant first took possession, after her death, of all the personal effects of the deceased, and he took such possession as executor, under a will which disposed of her entire personal property for the benefit of other legatees besides the plaintiffs, executed after the date of the alleged contract under which they claim. They did not act upon the supposition that they had any thing to do in execution of a power or license in order to vest in themselves the legal title to any portion of this property. They base their claim and have brought this action upon the ground that the legal title to the whole of it passed to them by the *unaided operation* of the contract of sale itself, and the performance of their part of it, that is, by performing or paying the consideration they agreed to perform or pay for the property they purchased.

But it has been argued that at least one of these contracts is to be treated as a contract to deliver the property upon the death of the vendor, and hence the question presented is not whether a party can convey property by deed which he has not, but whether he can contract to deliver property at a future time which he has not when he

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makes his contract. It may be conceded that it is now settled law that a contract for the sale of a specified quantity of goods or a certain number of shares of stock to be delivered at a future day, is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivery, otherwise than by purchasing them after making the contract. The courts have established this law in the supposed interest of trade and for commercial convenience, notwithstanding the admitted fact that such contracts partake of the nature of gambling transactions. But these contracts are executory and no title passes or is intended to pass by them until actual delivery of the goods. Hence if the vendor refuses to deliver at the appointed time it is very clear the vendee can maintain neither trespass nor trover for the property contracted to be delivered, though the vendor may then have it in his possession, and afterward sell it to some one else. Not having actual possession, nor any legal title conferring the right of immediate possession, he could maintain neither of these actions. His remedy is by an action on the contract itself, for a breach in refusing to deliver according to its terms. Assuming therefore, without intimating an opinion to that effect, that a party may verbally contract that all the personal property he may die possessed of, shall at his death be delivered to his vendee, and that such a contract would be binding upon his personal representatives, the latter upon refusal to deliver could not be sued in trespass or trover. The form of action against the administrator or executor must in such case, be the same as against the vendor, if the time of delivery had been fixed in his life-time, and he had refused. In the case put in argument that a party may bind himself in a penalty to cause his executor to transfer any specific property to the obligee at his, the obligor's death, the suit must be upon the bond, and not trespass or trover for the asportation or conversion of the property. The form of action therefore is essential to the plaintiffs' right to recover, if this be construed as a contract for the delivery of the property at the death of their mother. Their seventh prayer, to which the qualification we are now considering was added, asserts their right to recover *in this action*, and that authorizes and requires this court to determine whether there can be a recovery in the form of action which they have adopted. To meet this difficulty, we understand

the brief of the appellants' counsel to insist, that the replications have changed the form of action in which the declaration was framed, to one for a breach of a contract to deliver the property at a future time. We do not so read the replications. They each aver in substance, that by virtue of the contract stated, and performance by the plaintiffs of their part of it, the property mentioned in the declaration was and became their property, and the conclusion of each is but a reiteration of the averment of wrongful asportation and conversion contained in the declaration. The replications as well as the *narr.* are in trespass or trover. Taking, therefore, every possible view of the case, we discover no error in the court's modification of the plaintiffs' seventh prayer.

The defendant's sixth prayer limits the recovery in the same way, and contains the additional proposition that the burden of proof rests on the plaintiffs, to show what articles among those claimed for, the said Susannah had at the time the said contract was made. There is no error in this. It was incumbent on the plaintiffs to make out their case by proving every thing essential to their right to recover. They sue in trespass and trover and charge that the defendant wrongfully carried away and converted their property, consisting of certain goods and chattels specified in the declaration. It was essential to their recovery in this action, that they should offer some proof that the property taken and sold by the defendant or some of it belonging to them, and they could only prove this by showing that it was in possession of their mother at the date of the contract of sale, under which they claimed title. The proposition now under consideration does not, as we understand it, claim immunity to the defendant for seizing and selling the plaintiffs' goods, because by their permission they had been so intermixed with others which it was his right or duty to take, as to prevent identification or separation, or because at the time of taking, they failed to point out to him their own property, but concedes his liability for all articles so taken which they could prove to the satisfaction of the jury belonged to them by having been in their mother's possession at the date of their contract with her. It is not a case where a commingling or intermixture like that stated in *Hamilton v. Rogers* could in the nature of things have occurred. Without the proof which this proposition requires, the jury would have had before them no standard of damages, and nothing upon which they could base their ver-

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dict. In other words, there would have been an entire failure of proof upon a point essential to the plaintiffs' right to recover.

By their fifth prayer, the plaintiffs asked the court to instruct the jury, that they cannot find a waiver of the rights of the plaintiffs, or either of them, unless they find that they, or one of them, intended to waive such right. This prayer embodies no facts to which the law of it is to be applied, and we find no facts or circumstances proved in the case, which would admit an application of the law of waiver. It was, therefore, properly rejected for this reason alone, even if it were unobjectionable in other respects. A court cannot be called upon to settle legal principles which have no relevancy to the case before them; it should confine itself to those questions of law alone which arise upon the facts and circumstances established by the testimony, and which properly belong to the case at bar. 1 Gill. 25. The plaintiffs, by the granting of their second and fourth prayers, had the benefit of all the law on the subject of estoppel which they demanded.

Finding no error in the rulings excepted to by the appellants the judgment must be affirmed, and having disposed of the case in this way we should be stepping beyond the line of our duty if we noticed any of the exceptions appearing in the record to have been taken by the appellee. It was stated by counsel for the appellee, in argument, that a general demurrer was in fact interposed by the defendant to the plaintiffs' replications, which was overruled by the court below; but no such demurrer or judgment appears in the record, and hence the questions which would have arisen if that judgment had been presented by the record, on appeal for review, are not before us, and we therefore express no opinion upon them.

Judgment affirmed.

DORSEY, appellant, v. DORSEY.

(37 Md. 64.)

Constitutional law — power of legislature to order cases to be reheard.

An act of the legislature authorized the Court of Appeals to reopen and rehear certain enumerated cases which had been previously decided by the court and upon the hearing thereof, to pass such judgments, orders and decrees in the said cases as right and justice might require. On a motion to reinstate said cases, *held*, that the act was unconstitutional as an attempt on the part of the legislature to exercise judicial power.

MOTIONS to reinstate certain cases under chapter 310 of the acts of 1872. The opinion states the case.

Levin Gale, I. Nevitt Steele and Louis T. Wigfall, for motions.

James Makubin, Henry Stockbridge and Thomas Donalds, contra.

BARTOL, C. J. These several appeals were argued and decided in this court at the April term, 1869, and are reported in 30th Md. 489, 512 and 522.

By an act of assembly passed at the last session (1872, chap. 310), it was enacted as follows: "*that the court of appeals be and they are hereby authorized and empowered to reopen and rehear*" the said cases; "*and upon hearing thereof, to pass such judgments, orders and decrees in the said several cases, as right and justice may require.*"

Motions were made at the last term, on behalf of the appellant, to have the several cases reinstated, in pursuance of the act, in order that they may be reheard and decided anew; the motions being resisted on the part of the appellees, leave was given to the respective counsel to file notes of argument upon the motions, which was done; but at so late a period of the term as not to afford time or opportunity for the court to consider and decide the important questions involved, before the adjournment. These have since received our careful consideration, and we now proceed briefly to express our judgment upon the motion.

The proceeding which this court is now asked to take is based altogether upon the act of assembly to which we have referred. The

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subject-matter to which the act relates is certain judgments and decrees in suits between private parties, rendered by this court at the April term, 1869, and the purpose of the act is to authorize and empower this court to reopen and rehear the cases, in order that other and different judgments and decrees may be rendered between the parties.

Have we the lawful authority or power to do this, or can the general assembly constitutionally confer upon this court such power? These are vital and important questions which present themselves at the threshold of the case.

The effect of a final judgment is to conclude the rights of the parties litigant upon the subject-matter in controversy. The constitution declares (art. 4, § 15), that the judgments of the court of appeals shall be final and conclusive." It was said in *Munnikuyson v. Dorsett*, 2 H. & G. 374, "judgments at law are not lightly to be interfered with;" and again in *Kemp & Buckey v. Cook & Ridgely*, 18 Md. 131, it was said that "the judgment records of the State are the highest evidences of debt known to the law; they are presumed to have been made up after the most careful deliberation, upon trial or hearing of both parties. To permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy."

Except for special causes, and upon equitable grounds well defined and understood in the law, and which do not exist in these cases, courts of justice have no power to interfere with or to disturb their own final judgments and decrees after the lapse of the term in which they have been rendered. The powers of this court in this respect are no greater than belong to every court of record.

Independently of the provisions of the act of assembly on which this motion is based, it is very clear that this court possesses no power or authority to interfere with its solemn and final judgments and decrees rendered at the April term, 1869, or to reopen and rehear the cases then decided, for the purpose of correcting supposed errors therein, or of altering or changing the judgments and decrees then rendered.

This court is not clothed with any such arbitrary authority. Its exercise would be simply to deprive parties of their vested rights, after they have been adjudged and established by final judgment.

Can the legislature constitutionally confer such a power upon this

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court? or, in other words, is the act of 1872, chapter 310, a valid and constitutional exercise of the legislative power?

If this question were presented for the first time in Maryland, we should have little hesitation in answering it in the negative, for reasons which will be presently stated; but it is supposed to be settled by precedent. It is said that such legislation has been heretofore practiced in this State, and been sanctioned and acted upon by the court of appeals; and that it is too late now to question its validity. This makes it proper to refer to the several cases in which special acts of assembly of this kind have been acted upon by the court of appeals.

In *Garretson v. Cole*, 1 H. & J. 391, the court of appeals at June term, 1801, reinstated the case which had been decided at June term, 1799, under the act of 1800, chapter 88, which "authorized the court to reinstate the case if in their judgment and opinion, under all the circumstances of the case, the same would tend to do justice between the parties." The act was passed under peculiar circumstances, and it does not appear that any question was made or argued touching its constitutionality or validity.

In *Gover v. Hall*, 3 H. & J. 43, it appears that a bill had been filed in 1772, and a decree had been passed by the chancellor therein in 1797, from which an appeal was taken, and at June term, 1800, the court of appeals reversed the decree of the chancellor, and remanded the cause with instructions, for accounts to be stated, etc.

Whereupon in the chancery court upon further proceedings, on the 28th day of November, 1803, a decree was passed, and another appeal was taken; pending which, an act of assembly (1809, ch. 87) was passed; reciting, that the court of appeals by which the first appeal was decided, consisted of Judges RUMSEY, MACKALL and JONES; that Judge RUMSEY, who presided, declared himself disqualified to sit by reason of near relationship to one of the parties, etc. And doubts were entertained as to how far such decree was conclusive, and the court had ordered an argument of that question; and the act authorized, empowered and *directed* the court to hear and determine the matter of the decree of 1800, in the same manner as if that decree had not been made. The court proceeded under the act of assembly; but it does not appear that its validity or constitutionality was called in question. The argument of the counsel is not reported. In the opinion delivered by the court nothing is said on the question of the power of the legislature to

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pass the act; and as in the previous case of *Garretson v. Cole*, the constitutional question appears to have been waived, neither of those cases can, in our opinion, be relied on as any adjudication by the court upon the question of the constitutional power of the legislature. In *Gover v. Hall*, the act of assembly was by its terms mandatory upon the court; *directing* that the case should be reheard on its merits, as if no decree had been passed; which was manifestly beyond the constitutional power of the legislature to do, and if it had been questioned, must have been so held as was afterward decided in *Prout v. Berry*, 2 Gill, 147, where it was held, that an act conferring upon the court the right to hear an appeal in a special case, after the time allowed by the general law had passed, was null and void; because it directed the court to decide the cause in the same manner as if the appeal had been taken in time; which in view of the facts of the case, and the terms of the decree, the court considered could not be done without unsettling vested rights. Judge ARCHER, speaking for the court (p. 150), says: "Whatever might be said, were the question a new one, as to the power on the part of the legislature to confer on this court the right to hear appeals in special cases, after the time allowed by the general law for an appeal had passed by, it is now too late to question it; but such a law to have efficacy, must leave us untrammelled as to the mode or manner of administering justice."

In *Miller v. State, use of Fiery*, 8 Gill. 145, the court declared the act of 1845, chapter 358, unconstitutional and void, as an exercise by the legislature of judicial powers. The act required Washington county court to grant an appeal in a certain case, and to set out and embody in the record certain bills of exceptions designated in the act. The court rested its decision upon *Crane v. Meginnis*, 1 G. & J. 463, in which it had been held, that the allowing of *alimony* was a judicial act, not within the power of the legislature granting the divorce, and that the act of assembly, in so far as it provided for alimony, was void. The last case cited as furnishing a precedent for the act of 1872, now under consideration, is *Calvert v. Williams*, 10 Md. 478, 495.

In that case a bill was filed in the court of chancery, in June, 1850; an interlocutory decree passed in April, 1851, and a final decree on the 31st of May, 1853. The auditor's report was made on the 12th of July, 1853, and confirmed on the 28th of the same month, and a *fi. fa.* ordered thereon, the 15th of November, 1853.

On the 17th day of February, 1854, a petition was filed to open the enrollment of the decree, which was set down for hearing the 2d of March, 1854; an answer to the petition was filed on the 4th of March; the case was removed to the circuit court on the 9th of March, and on the 10th, the act of assembly was passed (1854, ch. 160). The act authorized the circuit court, providing a satisfactory *prima facie* case should be shown justifying it, to open the decree, to the end that Williams may account, etc., provided, the court be satisfied that justice should be done by opening, etc., and to grant him such redress as upon principles of equity and justice he may show himself entitled to.

The validity of the act of assembly was questioned, and much discussed. Judge BREWER, in his very able opinion (p. 486), considered that question settled in favor of the validity of the act by the cases of *Gover v. Hall*, 3 H. & J. 43; *Crane v. Meginnis*, 1 G. & J. 463; and *Prout v. Berry*, 12 id. 286. "The case," he said, "comes within the established principles of those cases." He then refers to the carefully guarded provisions of the act, and to the special circumstances of the case; and on page 489, says: "Independent of the particular provisions of the act of assembly, I think there would have been sufficient ground for opening the decree."

The court of appeals affirmed the ruling of Judge BREWER. Chief Justice LEGRAND, speaking for the court, uses the following language (p. 495): "Whilst we affirm the decision of the circuit court, we wish to be understood as doing so only in deference to past decisions in regard to such acts as that of 1854, chap. 160. Were we called upon for the first time to pronounce on the constitutionality of such legislation, we would not hesitate to decide against it; but we do not feel at liberty to do so, when the past history of our jurisprudence shows our impressions have not been shared by those who have gone before us."

This language of the court, employed with reference to the act of assembly then under consideration, is a plain and significant expression of the court's opinion as to the real character and effect of such legislation. The act of 1854, to which this language was applied, simply authorized a lower court to open a decree by default, to let in a meritorious defense. The equities calling for such rehearing were such, that the judge below said, as we have before stated, that in his opinion "*there would have been sufficient ground for opening*

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the decree, independent of the particular provisions of the act of assembly."

The act now before us goes much further, and appears to us to be much more liable to objection.

It undertakes to confer on this court the power, at its discretion, to annul and set aside its final judgments and decrees, rendered several terms ago upon full hearing and after careful consideration. If such legislation were sustained, there would be no end to controversies.

By the organic law of the State it is declared "that the legislative, executive and judicial powers of the government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said departments shall assume or discharge the duties of any other."—Declaration of Rights, art. 8.

It requires no argument to show that such legislation as the act before us is contrary to the intent and meaning of this article, and is an exercise by the legislature of judicial powers.

We have said thus much of the act of assembly on which this motion is based, because we are unwilling by our silence to appear to give our sanction to such legislation. At the same time we have been induced by a feeling of respect for the acts of a co-ordinate branch of the government, to give our most careful consideration to the suggestions and reasons which have been urged in argument by the appellant's counsel, in support of the motions; and have come to the conclusion that there are no sufficient grounds for opening the judgments and decrees heretofore rendered, even if our power to do so were unquestionable.

Under the act of assembly, if it be conceded to be constitutional and valid, the motion addresses itself to the discretion of the court, and we have seen no sufficient legal or equitable grounds for disturbing the judgments or decrees heretofore rendered. Upon a careful review of the decisions in the several cases, we are of opinion that the supposed errors which have been suggested do not exist, and that the rehearing of the cases could result only in leaving the original judgments and decrees undisturbed.

It has been suggested that the opinions expressed by this court in the former decision of these cases, with respect to the liability of a citizen of Maryland who was voluntarily within the Confederate States during the late civil war, to be proceeded against as an absentee, either by process of attachment against his property, or by

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a suit in chancery to subject his lands within this State to sale under a mortgage, are contrary to the recent decisions of the supreme court of the United States on that question. But an examination of those decisions will show that there is no conflict between the decisions of this court in 30th Maryland, and the latest decisions of the supreme court in *Ludlow v. Ramsey*, 11 Wal. 581, and *McVeigh v. The United States*, id. 259.

Since these motions were submitted, we have heard the very full argument, at the present term, of the case of *J. T. B. Dorsey v. Mary A. T. Thompson and others*, in which the same questions involved in the decision of the cases referred to in the act of assembly, and embraced in these motions, were discussed. They have been re-examined by us in disposing of that case, and we refer to the opinion of this court therein, as an answer to much of the argument urged in support of these motions.

Motions overruled.

PETERSON, appellant, v. SENTMAN.

(37 Md. 140.)

Slander — pleading.

In an action of slander the declaration was that defendant charged plaintiff with keeping "a bad house," *innuendo* a bawdy-house. *Held*, that the declaration was bad for want of a sufficient *colloquium* to justify the *innuendo*.

ACTION of slander brought by the appellee against the appellant. The material part of the declaration charged that on the — day of —, A. D. 186—, at the county and State aforesaid, in a certain discourse which he, the said defendant, then and there had in and about the plaintiff's character and reputation for chastity, in the presence and hearing of divers good and worthy citizens of said State of Maryland, to the said plaintiff, and of and concerning said plaintiff, in the presence and hearing of said citizens, falsely and maliciously spoke to her, and published to, of and concerning her, the said plaintiff, then and there being a *feme sole*, the several false, scandalous, malicious and defamatory words touching her character

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and reputation for chastity, and tending to the injury thereof, following, that is to say: "You" (meaning the plaintiff) "are a bad woman, and keep a bad house, and I can prove it," meaning thereby to charge that the plaintiff was not a chaste woman, was a whore, and kept a common bawdy house.

To this declaration the defendant pleaded not guilty, and two special pleas in justification. The jury rendered a verdict in favor of the plaintiff for \$3,683, and judgment was entered for the same, with costs. The defendant appealed.

James T. McCullough and Henry W. Archer, for appellant.

Henry D. Farnandis, for appellee.

BRENT, J. The first and principal question presented upon this appeal is one of pleading. The declaration, after averring that the plaintiff is a *feme sole*, and a housekeeper, and has always been a virtuous, modest and chaste citizen, etc., alleges that in a certain discourse in and about the plaintiff's character and reputation for chastity, the defendant falsely, scandalously and maliciously spoke and published of her character and reputation for chastity, the following words: "You" (meaning the plaintiff) "are a bad woman, and keep a bad house, and I can prove it," meaning thereby to charge that the plaintiff was not a chaste woman, was a whore, and kept a common bawdy house.

The same allegations are substantially made in the other two counts in the declaration, and what is said of the first will equally apply to them.

It is contended by the defendant, that the declaration contains no sufficient *colloquium* to support and warrant an *innuendo*, that in saying that the plaintiff kept a "bad house," the defendant meant thereby to charge that she "kept a common bawdy house," and in this view we concur.

Charging a person with keeping a "bad house" is not in itself actionable. The words, however objectionable they may be, admit of other constructions, which readily suggest themselves to the mind, than that given to them by the plaintiff. To say that a person keeps a bad house may mean a disorderly house, or one that is dirty or comfortless. So indefinite is their meaning, that to render them the foundation of an action like the present, the declaration

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must set out such a statement of circumstances under which they were used, or of the subject-matter of the conversation, as will indicate that they were applied in a sense imputing to the plaintiff the wrong complained of. But this, under a rule of pleading firmly established by all the authorities, must be done through a *colloquium* and not by way of *innuendo*, the only object of which is to point to and explain what has before been introduced in the declaration. Unsupported by the necessary allegations of a *colloquium*, the *innuendo* can never be taken to expand or enlarge the meaning of the words used, and give to them a particular meaning, different from that in which they would be ordinarily understood in their more innocent signification. Words will not be construed to impute a crime, if in their milder sense they have another and more harmless meaning, unless the connection in which they are used and applied would give to them that effect. The office of the *colloquium* and *innuendo* in actions of this description, is very satisfactorily stated in the case of *Van Vechten v. Hopkins*, 5 Johns. 211 (1 Amer. L. C. 117). In illustrating the proper office of these distinctive parts of a declaration, the court refer to *Barham's Case*, 4 Coke, 20, and say of it — "Barham brought an action for the defendant's saying of him, 'Barham burnt my barn,' (*innuendo*) 'a barn with corn.' The action was held not to lie; because burning a barn, unless it had corn in it, was not felony." "But," says DE GRAY, C. J., in *Rex v. Horne*, 2 Cowp. 684, "if in the introduction it had been averred that the defendant had burnt a barn full of corn, and that in a discourse about that barn the defendant had spoken the words charged in the declaration, an *innuendo* of its being the barn full of corn would have been good; for by coupling the *innuendo* in the libel with the introductory averment it would have been complete." "Here the extrinsic fact that the defendant had a barn full of corn is the averment. The allegation that the words were uttered in a conversation in reference to that barn is the *colloquium*, and the explanation given to the words thus spoken is the *innuendo*."

In the case before us, the declaration is wholly silent, in its introductory part, as to the house of the plaintiff. There is an averment that the plaintiff was a housekeeper, but it is nowhere alleged, by way of *colloquium*, that the house in which she lived, or its character as kept by her, was the subject of conversation, or the particular object referred to by the defendant, when he used the terms "bad house" and "ornary house." The words "you keep a bad

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house" are not actionable, and cannot be made so by an *innuendo* unless properly introduced by a *colloquium*. In the case of *Snell v. Snow*, 13 Metc. 278, the declaration charged the defendant with falsely and maliciously saying of the plaintiff, "she is a bad girl, a very bad girl," *innuendo*, "that she was a prostitute and had committed the atrocious crime of fornication." The declaration was held to be insufficient because it did not contain the necessary averments and *colloquium* to warrant the *innuendo*. A very similar case to the present is that of *Dodge v. Lacey*, 2 Cart. 213, decided by BLACKFORD, J. In that case the declaration charged the defendant, in a conversation concerning the character of the plaintiff for chastity, with falsely and maliciously saying and publishing of her, that she kept "a public house (meaning a bawdy house)." The court held the declaration was defective, upon the ground that there was no sufficient *colloquium* to justify the *innuendo*. Authorities upon this point could be cited to a very large number, but it is unnecessary, as they all concur in the inflexible rule, that words that are not actionable *ex vi termini* cannot be made so by an *innuendo*, but must be aided by a proper averment and *colloquium*, which will warrant the explanatory meaning given them by the *innuendo*.

The rule may be a strictly technical one, and may operate harshly in its application to this case, but it is too firmly established to be departed from. And under it we hold it to be clear, that there is no sufficient allegation in the declaration before us, requiring the defendant to answer to the charge of having said of the plaintiff that she kept a bawdy house. We do not however mean that the declaration is wholly bad. The charge that the plaintiff was unchaste is sufficiently set forth, and in this respect the declaration is a good one. But the absence of any sufficient allegation in regard to the character of the plaintiff's house materially affects the pleas of the defendant and the third instruction granted by the court. The first set of special pleas filed by the defendant were not insisted upon at the argument. The demurrer to them was properly sustained. But it follows from what we have said in regard to the declaration, that the second plea, of those secondly pleaded, is a good plea of justification, and the demurrer to it ought to have been overruled. The third instruction was improperly granted, as it rests entirely upon the assumption that the declaration charges the defendant with saying of the plaintiff that she kept a bawdy house. For these reasons the judgment of the court will be reversed.

Hoopes v. Strasburger.

There are other questions presented in this case, which it is unnecessary for us to examine at length. We will however add that the rulings of the court below upon them were correct, except in so far as they are modified by what we have already said.

Judgment reversed and new trial ordered.

HOOPES, appellant, v. STRASBURGER.

(37 Md. 300.)

Payment — note of third person. Fraud.

The plaintiff sold and delivered certain goods to the defendant for a stipulated price, a part of which was paid in cash, and agreed to accept in payment of the balance, a note of a third party, and run the risk of its being paid, relying upon the representations of the defendant, who stated that the note was good, and would be paid at maturity. The note was not paid at maturity, and proved worthless, the drawers having failed several days before it became due. On the day of its maturity the plaintiff notified the defendant of its non-payment, and of the failure of the makers, and demanded of him payment of the balance due on the goods sold. *Held*, that if the agreement to accept the note as payment was induced by the fraudulent misrepresentations of the defendant, such fraud rendered the receipt given by the plaintiff invalid, and he had the right to affirm the sale and sue in *assumpsit* for the price of the goods.

ASSUMPSIT for goods sold on an account stated. The opinion states the case. The plaintiff had a verdict and judgment below and defendant appealed.

B. C. Barroll, for appellant.

W. B. Trundle, for appellee.

BARTOL, C. J. The appellee sued the appellant in *assumpsit*, and declared for goods bargained and sold and on an account stated; the *narr.* also contains the other common counts. The defendant pleaded, "that he never promised as alleged." and "payment."

At the trial the plaintiff produced a promissory note, dated December 6, 1867, for \$150, payable twenty days after date, to the order of

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V. Strasburger (the plaintiff), and signed by Brewer & Hoffacker, and offered to deliver the same to the defendant, which the latter refused.

The plaintiff then proved that he sold a carpet and rug to the defendant for \$153.59; and gave in evidence the bill and receipt as follows:

“ D. H. HOOPES,

“ To V. STRASBURGER, Dr.

“ 1867.

“ Dec. 6, To 67½ yds. Brussels carpeting, at \$2.15 per yard .. \$144 59

“ 1 Rug 9 00

“ \$153 59

“ Received payment in full of the above account, by note of Brewer & Hoffacker; I running the risk of the note being paid.

“ V. STRASBURGER.”

The carpeting was delivered at defendant's dwelling.

The note was not paid at maturity, and proved worthless; the drawers having failed several days before it became due, and left the city. Of these facts, the defendant was immediately notified, and payment of the bill demanded of him.

Testimony was offered on the part of the plaintiff, tending to prove that the note was worthless, that the makers were insolvent at the time the note was passed, that these facts were well known to the defendant, and that he falsely and fraudulently represented the note to be good, and that it would be paid at maturity. The defendant offered evidence contradictory of the same, and tending to prove the *bona fides* of the transaction on his part.

If a party accept from his debtor, a note or bill of a third person, and “agree to receive it absolutely as payment, and to run the risk of its being paid,” the original debt will thereby be paid and extinguished. *Glenn v. Smith*, 2 G. & J. 509; *Berry v. Griffin et al.*, 10 Md. 27. It is very clear, therefore, that in the absence of fraud on the part of the defendant, the receipt of the plaintiff offered in evidence would be a bar to the present action. But the plaintiff seeks to avoid its effect, by showing that the defendant falsely and fraudulently represented that the promissory note of Brewer & Hoffacker was good and would be paid, when in fact he knew that it was worthless, and thereby induced the plaintiff to accept the note, and give

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the receipt. There appears to have been a conflict of testimony upon the question of fraudulent misrepresentation; but it was fairly submitted to the jury by the plaintiff's prayer, which was granted, and was found against the defendant. We must therefore deal with the case, assuming the fraud to be established.

The question for this court to determine is, what is its legal effect upon the rights of the parties in the present suit? And we shall consider first the several grounds of defense presented by the defendant's prayers, and relied on by the appellant. These resolve themselves into an objection to the form of action which rests upon the theory that the bill and receipt constitute a special contract, whereby the plaintiff agreed to sell and deliver the goods, and receive in exchange or payment therefor the note of Brewer & Hoffacker, that the legal effect of the agreement when executed by the delivery of the goods, and the receipt of the note, was to satisfy and extinguish the plaintiff's demand for the price of the goods, and to destroy his right of action to recover the same in an action of assumpsit, for goods sold and delivered. That if he was induced to enter into the contract by the fraud or misrepresentations of the defendant, his remedy was by an action of tort, for the deceit, or he might have repudiated the contract, as soon as the fraud was discovered, and promptly returned or tendered the note to defendant, and recovered the goods by an action of replevin, or their value in trover.

In support of this theory, a very ingenious argument was made by the appellant's counsel, who cited *Masson v. Bovet*, 1 Denio, 69; *Fisher v. Fredenhall*, 21 Barb. 82; and *Clements v. Smith and others*, 9 Gill, 156. We think these cases do not support the appellant's positions to the full extent contended for. Unquestionably it would have been competent for the plaintiff, on discovery of the fraud, to have sued in *tort* for the deceit; or he might have repudiated the whole contract, and asserted his right to the goods; this is the extent of the decision, in 1 Denio and 9 Gill; the same doctrine was decided in *Alexander v. Dennis*, 9 Porter, 174. But these authorities do not support the position, that in a case like this, a suit cannot be maintained on the original cause of action for the price of the goods. In 21 Barb. which was a case somewhat like this, the court held that the action by the vendor on the contract of sale could not be maintained. But there was no fraud alleged on the part of the vendee, and the case was in other respects unlike the present.

The transaction between these parties, as evidenced by the bill

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and receipt, was not such a special contract as the appellant has construed it. It was a sale and delivery of goods by the plaintiff to the defendant, for a stipulated price; and an agreement to accept in payment therefor, a note of a third party, and run the risk of its being paid. If the agreement to accept the note as payment was induced by the fraudulent misrepresentations of the defendant, the effect of the fraud is to render the receipt invalid. The transaction consists of two elements, easily separable, and there is no reason why the plaintiff may not affirm the sale, and sue in assumpsit for the price. To such an action, the receipt having been obtained by fraud, could furnish no valid defense.

In support of this position, we refer to *Trisler v. Williamson*, 4 H. & McH. 219, decided by the general court in 1798, a case which we accept as binding authority in Maryland. It was argued by eminent counsel, and decided by learned and able judges, and although no opinion appears to have been delivered by the court, the point ruled clearly appears in the report; and, we think, supports the views we have expressed in the present case.

The argument of the appellant's counsel, that it was the duty of the appellee to return or tender the note to the appellant promptly after discovering the fraud, is answered by the cases of *Glenn v. Smith*, 2 G. & J. 493, and *Wyman v. Rae*, 11 id. 416, which show that the production of the note and the offer to deliver it to the defendant at the time of the trial, was sufficient. The receipt being rendered void and of no effect, by the fraud of the defendant, the case stood in this respect, as if no receipt had been given. The defendant cannot be heard to complain of any prejudice suffered by him, in consequence of delay in tendering him the note; because he was promptly notified of the failure and default of the makers to pay it, and might, by paying the plaintiff's bill, have at once entitled himself to its possession.

We have not considered the several prayers of the defendant separately, because they are comprehended in the points to which we have adverted.

We think there was no error in rejecting them; and being of opinion that the instruction given to the jury in the plaintiff's prayer was correct, and fully covered the law of the case, we affirm the judgment.

Judgment affirmed.

McCREERY, appellant, v. CLAFFLIN.

(87 Md. 436.)

Distress — goods exempt from.

The goods of a principal in the store of his commission merchant for sale are not liable to distress for rent due by the latter to the landlord of the premises.

REPLEVIN brought on the 9th of February, 1871, by the appellees against the appellant, to recover certain bales of flannel, which he had distrained for rent due him by Thomas Goodwin and James Oliver, trading as Goodwin, Oliver & Co., tenants of the premises where the goods were found.

The defendant avowed the taking of the goods mentioned in the declaration, for rent in arrear, due him by the said Goodwin, Oliver & Co., for three-fourths of a year, for the premises where said goods were found. The plaintiffs pleaded to the avowry, that the said Goodwin and Oliver were at the time of the said taking, and for a long time prior thereto had been, factors and commission merchants; that the said goods in the declaration mentioned were the property of the plaintiffs, and at the time of the taking of the same by the said defendant, were in the possession of said Goodwin, Oliver & Co., as factors or commission merchants of the said plaintiffs, by whom the same had been consigned to the said Goodwin and Oliver, to be sold by them on account of the plaintiffs. Issue was joined. Judgment was for the plaintiff, and defendant appealed.

Patrick M'Laughlin, for appellant, argued that the goods distrained were not entitled to exemption from distress, and in support thereof cited the following authorities: *Gisbourn v. Hurst*, 1 Salk. 250; *Francis v. Wyatt*, 3 Burr. 1500, 1503; *Muspratt v. Gregory*, 1 M. & W. 633, and 3 id. 677; *Joul v. Jackson*, 7 id. 450; *Gorton v. Falkner*, 4 Term, 568; *Trieper v. Knabe & Betts*, 12 Md. 494.

A. C. Trippe and *J. Morrison Harris*, for appellee.

STEWART, J. The only question here is, as to the extent of the landlord's right to distrain upon the goods found upon the demised premises. Whether in fact the merchandise sent to Goodwin, Oliver

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& Co., as factors, for sale, on account of the owners, the appellees, is exempt by law from the distress for rent due by the tenants, the factors, when they also sold goods at the same place, on their own account, and had no public sign that they were factors, and the landlord was a non-resident?

It was urged by the counsel for the appellees, that goods found upon the premises under such circumstances were excepted; and that the summary process for the recovery of rent was a vestige of the feudal system, and that the court should adopt the most liberal construction to release property from its grasp.

Chief Justice GIBSON, in *Brown v. Simms*, 17 S. & R. 139, speaks of it as a feudal prerogative handed down from a period when chattels were of little account, and that the most plausible argument in support of it is, that as the landlord is supposed to have given credit to a visible stock on the premises, he ought to be allowed recourse to every thing he finds there. Chancellor KENT, on the other hand (3 Kent's Com. 625), thinks it a necessary and useful provision, dictated by sound policy, and that the prosperity and growth of our cities would be seriously checked if the law did not afford landlords a speedy and effectual security for their rents.

Chief Justice DENMAN, in the case of *Muspratt v. Gregory*, 3 M & W. 678, remarks, in regard to the argument, urging the policy of a relaxation of the rule for the promotion of trade, that all laws profess to be founded on the principle that they are for the public good, but what is or not for the public good is a matter of speculation, upon which the wisest men may differ, and as to which the judges are not at liberty to promulgate new rules of law. Such was the view of C. J. LE GRAND, in *Trieber v. Knabe & Betts*, 12 Md. 491, referring the correction of any abuse to the legislative department, as the proper authority for that purpose. We find no reason to dissent from this view, and such has been the legislative interpretation, and laws have been enacted by the State modifying in some respect the rigor of the common law; and we must leave to that branch of the government to determine what public policy may dictate. Under the exceptions in favor of trade, reference of course must be had to the description of articles pertaining to that subject. Whilst the general rule holds all chattels found upon the demised premises, *prima facie* liable for the rent, it is subject to the exceptions recognized on grounds of public policy, for the benefit of trade, or

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the preservation of the peace, of certain classes of articles; and embrace all property of like character or *ejusdem generis*.

Whilst there have been differing adjudications as to what are the exceptions, and as to the extent of the exemption under the privilege of trade, so far as our researches have extended, all the adjudged cases concur that goods delivered to tradesmen, artificers, carriers, factors, wharfingers, auctioneers, and the like, without qualification, are exempted. See *Muspratt v. Gregorg*, 3 Mecs. & Wels. 678; *Gilman v. Elton*, 3 Brod. & Bing. 75; *Findon v. McLaren*, 6 Ad. & Ell. (51 E. C. L.) 890; *Matthias v. Mesnard*, 2 Car. & Payne, 353; *Walker v. Johnson*, 4 McCord, 552; *Brown v. Sims*, 17 Serg. & Rawle, 138; *Connah v. Hale*, 23 Wend. 462. In 3 Kent's Com., on the subject of the remedy for the collection of rent, beginning at page 607; also in Smith's Leading Cases, 661, and in 6 Rob. Prac. 526, the various authorities both in England and this country are referred to, and it would be an unprofitable consumption of time to undertake to review them here.

In *Trieber v. Knabe & Betts*, 12 Md. 492, they were examined, and the judgment in *Simpson v. Hartopp*, 512, was recognized as a clear statement of the law upon the subject.

Five general exceptions to the rule are stated — some of them, absolutely — others *sub modo* — amongst those excepted, without qualification, are "things delivered to a person exercising a public trade, to be carried, wrought, worked up or managed, in the way of his trade or employ;" but as the exceptions are merely given, by way of example, any goods excepted must be shown to be *ejusdem generis* — and in determining which are of that character, some diversity of opinion has been expressed. The counsel for the appellant conceded the law to be as stated generally, but contended for the distinction sought to be made in his prayer, that as the tenants in this case, besides receiving goods for sale, as factors or commission merchants (if there be any legal distinction between them), also sold goods on their own individual account; that such fact made a difference — that to enable them to have the protection afforded, under the exception, in favor of trade, their vocation ought to be exclusive and notorious, by having their sign at their place of business to that effect — and further, that as the landlord was a non-resident, and ignorant of the vocation of his tenants as factors, the goods and merchandise upon the premises were not entitled to be exempted. We find no authority to sustain such a proposition.

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The goods not belonging to the tenant are exempt from distress for rent whilst they are in the hands of the commission merchant or factor, not so much on account of a *special privilege to the tenant*, but for the benefit of trade and commerce, and *for the purpose of protecting the owner of the goods*, who has confided them to the tenant for sale.

It is not material whether the landlord is aware of the true owner of the goods or not. Such we take to be the reason of the decision in the case of *Gisbourn v. Hurst*, 1 Salk. 249, where the party was not a common carrier, but occasionally brought from the country cheese to London, and on his return carried back in his wagon such goods as he could get for a reasonable price, and it was determined by the court, that he was, as to this privilege, a common carrier, and the goods in his custody were protected from distress for rent; not from special regard to him, but in respect of the *trader*; and such we apprehend to be the doctrine of all the cases.

We find no error in the rulings of the superior court.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN

TISHER V. BECKWITH, appellant.

(30 Wis. 55.)

Deed — stolen deed will not pass title.

A deed not fully executed, and which had never been delivered, was stolen from the possession of the grantor, without negligence on his part, by the grantee named therein. Held, that no title passed, even as to subsequent purchasers.

ACTION against Beckwith and the sheriff of Waupaca county to restrain the execution of a deed of certain mortgaged premises, which had been sold to Beckwith under judgment in a foreclosure suit, and to compel defendants to convey the title acquired by them by such sale to the plaintiff.

The evidence tended to show that the plaintiff *Tisher* was in possession of the premises in question as a homestead; that he had partly executed, but had never delivered, a deed of the premises to his son Charles; that this deed was unstamped and bore no consideration or date; that the deed was placed by plaintiff in a small box which was kept locked and the key to which was kept by Mrs. Tisher; that the son Charles kept his papers in the same box but had no key, and that he had without plaintiff's authority taken said deed therefrom.

The defendant claimed the premises by virtue of a foreclosure sale under a certain mortgage executed by Charles Tisher. The

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court found as facts that the pretended deed from plaintiff to Charles was never fully executed and was never delivered, but was purloined by the said Charles Fisher without plaintiff's knowledge or consent, and granted the relief prayed for. Defendant appealed.

Felker & Weisbrod, for appellant.

E. L. Browne, for respondent.

DIXON, C. J. The fourth finding of fact by the court below is in these words: "That the pretended deed from said plaintiff and his wife to Charles H. Tisher was never fully executed and was never delivered, and that the same was purloined or stolen from said plaintiff without his knowledge, consent or acquiescence." If this finding be correct and sustained by the evidence, it obviously puts an end to all claim of title to the land on the part of the defendants. It has been held by this court that the fraudulent procurement of a deed deposited as an escrow from the depository by the grantee named therein, will not operate to pass the title, and a subsequent purchaser of such grantee, for valuable consideration without notice, derives no title thereby and will not be protected. *Everts v. Agnes & Swift*, 4 Wis. 343; *Same v. Same*, 6 id. 453. It is essential to the validity of a deed that it should be delivered, and such delivery to be valid must be voluntary, that is, made with the assent and in pursuance of an intention on the part of the grantor to deliver it, and if not so delivered it conveys no title. A deed purloined or stolen from the grantor, or the possession of which was fraudulently or wrongfully obtained from him without his knowledge, consent or acquiescence, is no more effectual to pass the title to the supposed grantee, than if it were a total forgery, and an instrument of the latter kind had been spread upon the record. The only question which can ever arise to defeat the title of the supposed grantor in such cases is, whether he was guilty of any negligence in having made, signed and acknowledged the instrument, and in suffering it to be kept or deposited in some place where he knew the party named as grantee might, if so disposed, readily and without trouble obtain such wrongful possession of it, and so be enabled to deceive and defraud innocent third persons. It might possibly be that a case of that kind could be presented where the negligence of the supposed grantor in this

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respect was so great, and his inattention and carelessness to the rights of others so marked, that the law would on that account estop him from setting up his title as against a *bona fide* purchaser for value under such deed. See *Evarts v. Agnes et al.*, 6 Wis. 453. There are some facts and circumstances in this case strongly suggestive of such a defense, and were it not for the fact found by the court that the deed was never fully executed, and the further fact fully established in evidence that it was unstamped when put away by the plaintiff in the trunk in the manner described by himself and the other witnesses, we might possibly have some hesitation about affirming the judgment of the court below on this ground.

It appears from the plaintiff's own testimony that the trunk was easily accessible to his son, the person named in the instrument as grantee, for he says that his son, who was acting as town clerk at the time, kept his papers there, although he also testifies that the son had no key to the trunk, but that his, plaintiff's, wife kept the key in a small box in another trunk belonging to her and which was locked. A deed fully executed and which had been so kept or deposited would seem to furnish some evidence, more or less strong, of negligence on the part of the grantor. It would be unlike the case of a deed executed and deposited in escrow, which this court said was recognized as a legitimate business transaction. But the finding is that the deed was not fully executed nor was it stamped, and the question is, whether it was negligence so to keep such an instrument, and we are not prepared to say that it was. It occurs to us, as it probably did to the court below, that most men of ordinary care and circumspection would not have regarded this as unsafe or imprudent or careless. An instrument complete in all its parts and lacking nothing to give it validity but delivery to the person named in it as grantee, might excite the cupidity of such person to take wrongful possession of it when frequent opportunity for that purpose was afforded, but that an unfinished instrument, one partially executed and not ready for delivery, would present the same temptation would hardly suggest itself to the mind of any ordinary prudent and cautious man. It would hardly occur to such a man that such an instrument would be purloined or wrongfully taken, when to give it any apparent validity in the hands of the supposed grantee the crime of forgery must also be committed. It is for these reasons that this court is of opinion that the facts proved were not sufficient to take the case out of the general rule of law above stated, ever

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taking the most liberal view of the facts in favor of the defendants. There are cases, however, the tendency of which would seem to be that the failure of the plaintiff to suspect and treat his son as a knave, thief or criminal, could not be attributed to him as negligence. See the able and well-considered opinion of the court by CHRISTIANCY, J., in *Burson v. Huntington*, 21 Mich. 415 (4 Am. R. 497), a case involving the same question with respect to the delivery of a negotiable promissory note, and which, not having been delivered by the maker but stolen or wrongfully taken and put in circulation by the payee, was held void in the hands of a *bona fide* holder for value. The same case also makes a distinction between a note or other instrument so obtained and one deposited in escrow and afterward fraudulently delivered by the depositories, holding that in the latter case the maker would be bound as against an innocent holder for value, on the ground of the trust or confidence reposed by him in the depository, and upon the principle that, when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Upon the same question also of negligence, see *Wait v. Pomeroy*, 20 Mich. 425 (4 Am. R. 395). It only remains, therefore, to be inquired whether the evidence given on the trial was such as to sustain the finding of the court above quoted.

We are of opinion that the preponderance of testimony was decidedly in favor of the finding. If we omit from our consideration entirely the testimony of the plaintiff, which was clear and strong and whose credibility and fairness we discover nothing to impeach, except the mere fact of his interest, the finding was fully sustained by the testimony of the witnesses, Quimby, Wooden and Mrs. Scheppe, who corroborated the plaintiff in almost every particular to which he testified. Opposed to the testimony of these witnesses was only that of the witness Hoxie, who testified merely to certain admissions and conduct of the plaintiff calculated to induce the witness to believe that the plaintiff had conveyed the land to his son. In this, Hoxie was directly contradicted by the plaintiff, and there again the plaintiff was corroborated by the witness Wooden, who was present on the occasion spoken of by Hoxie. In every view in which the testimony presents itself to our minds, we are constrained to say that this finding of the court below was correct, and consequently, that the judgment must be affirmed.

Judgment affirmed.

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SPAULDING V. CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
appellant.

(30 Wis. 110.)

*Fire communicated by reason of negligence. English statutes. Railroads.
Burden of proof.*

The stat. 6 Anne, chap. 3, § 6, providing that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin" is part of the common law of this country; otherwise of the stat. 14 Geo. III, chap. 78, § 86, which exempts from liability persons "in whose house, chamber, stable, barn, or other building, or *on whose* estate any fire shall accidentally begin."

In an action against a railroad company to recover for injuries occasioned by the escape of fire from one of its engines, *held*, that the burden of proof is on the company to show that the engine was properly constructed and properly managed.

ACTION to recover damages for injuries occasioned to plaintiff's property by fire alleged to have originated on defendant's roadway, by reason of an unsafe locomotive, and by reason of defendant's having negligently allowed dry and combustible matter to accumulate on its roadway. The evidence for the plaintiff tended to show that the fires which injured plaintiff's woodland, originated on defendant's roadway from coals dropped from an engine.

Upon the close of plaintiff's evidence, defendant moved for a nonsuit, on the ground that plaintiff had not shown that the defendant's engine was improperly constructed or managed, which motion was refused.

The defendant's evidence tended to show that its locomotives were properly constructed and were provided with the most approved appliances for preventing the escape of sparks and fire, and that they were properly managed; that plaintiff was accustomed to burn the dry herbage, etc., from its roadway every spring to prevent damage to adjoining property, and that portions of the way on both sides of the place where the fire was alleged to have originated had been so burnt over, but that the point in question was not so burnt over from the fact that from the situation of the point, and the direction of the wind, it could not safely be done.

The other facts and the instructions given by the court appear in

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the opinion. Verdict and judgment for the plaintiff; defendant appealed.

Pease & Ruyer, for appellant.

Cassaday & Merrill, for respondent.

DIXON, C. J. That the statute 6 Anne, chap. 3, § 6, enacted in 1707, with the interpretation heretofore supposed to have been given to it in England in the time of Blackstone and before, is in force as part of the common law of this State, was assumed by this court in the case of *Kellogg v. The Chicago & Northwestern Railway Co.*, 26 Wis. 223; 7 Am. R. 69. As will be seen by the reference, the words of that statute, "in whose house or chamber any fire shall *accidentally* begin," had been construed as if the statute read, "in whose house or chamber any fire shall *negligently* begin," thus exempting from liability, as Blackstone says, for the loss or damage sustained by others, the owner or occupant through whose negligence or through the negligence or carelessness of whose servants the fire was set, his own loss being regarded as sufficient punishment for such negligence. That statute, with the construction so said to have been put upon it in England, at and long before the time of our revolution, has no doubt generally been considered as constituting a part of the common law of this State as it probably has of all or nearly all of the other States of the Union. It was, as we have every reason to think, so looked upon as part of the law of the colonies before the revolution and during the period of their dependence upon the laws and constitutions of Great Britain.

But with respect to the other British statute upon which reliance is placed by the railway company here, and which was also enacted before the revolution, namely, the statute 14 George III, chap. 78, § 86, enacted in 1774, which enlarged the operation of the statute of Anne, by declaring "that no action, suit or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall after the said twenty-fourth day of June, accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby," it is more than doubtful whether any effect, indeed it seems quite clear that no effect can be given to it as a part of the common law of this country. The rule fixing the

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period of our revolution as the time from which the English statutes and acts of parliament shall be considered as part of the common laws of this country, or that those statutes enacted before that time and which were adapted to our condition and circumstances as a people, shall be so considered, is a general one adopted for convenience merely, and which should govern in the generality of cases, but not one intended to apply always and to all cases or to all statutes which may have been so enacted, without regard to any other facts or circumstances. The fundamental idea represented by the rule and upon which it is based is, that those statutes which were so enacted and which were suited to the condition and circumstances of our colonial ancestors, had been received, acted upon and ratified by them as part of the jurisprudence and laws of the colonies before the separation from the mother country, and which, upon the separation, the colonists took with them as the still continuing law, except where subsequently repealed or modified by positive legislative enactment. This view of the reasons and grounds of the rule would seem to exclude the statute in question from the operation of it, since the same was enacted on the very eve of the revolution, and at a time when we know our ancestors, in their colonial state, could not have become familiar with, or have ratified or adopted it, and at a time, too, when, as history shows, all or nearly all respect for British sovereignty and British laws or acts of parliament then being passed, as well nigh extinct throughout the colonies. That our ancestors did not, and could not have adopted and acted upon this statute as part of their laws before their independence, is, therefore, very certain. It is certain from a consideration of the time and circumstances under which the statute was enacted, and also from a consideration of the law as we know it to have been constantly understood and administered in this country since the revolution. As to the statute of Anne, we know that it, with the construction previously supposed to have been put upon it, has been generally understood and regarded as constituting a rule of our common law, because it has been expressly so adjudged in some cases, and because in all the history and records of our judicial proceedings there exists not a precedent, under circumstances where there might have been thousands, of an action or recovery contrary to the provisions of that statute as the same is alleged to have been understood in England, and was doubtless understood in the colonies before the revolution took place. But as to this statute of George III, the his-

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tory of our law shows clearly and beyond the possibility of question or doubt, that it never has been so understood or applied by the courts of this country. The cases are most numerous, and to be found in the courts of almost every State of the Union, as well as in the Federal courts, where actions have been maintained and recoveries had against proprietors and occupants on whose land or estate fires have been negligently set or negligently permitted to begin or spread so as to extend to and consume or cause injury to the property of others. In such cases it has been invariably held that the negligent party is answerable in damage for the losses of third persons so caused and sustained.

The foregoing observations have been made upon the supposition that the statute of Geo. III has or should receive the same construction to relieve from liability for *negligence* which the statute of Anne has been supposed to have received. We have seen, by the date of its enactment, that it had not and could not well have received any judicial construction by the courts of England, known to our ancestors during the continuance of their colonial relations, or before these relations ended. It did not in fact receive any such construction until the year 1847, more than seventy-three years after its enactment, when it came up for consideration before Lord DENMAN, C. J., in the court of queen's bench, in the case of *Filliter v. Phippard*, 11 Adolph. and El. N. S. (63 E. C. L.) 347, in which it was construed not to include cases of fire set or produced by negligence. The same statute or the kindred one (14 Geo. III, c. 78) had been incidentally considered four years before in the high court of chancery, by Lord LYNTHURST, in the case of *Viscount Canterbury v. The Attorney-General*, 1 Phillip's Ch. 306, 315, 320. And in the still earlier case decided in the common pleas, in 1837, *Vaughan v. Menlove*, 3 Bing. N. C. 468 (32 E. C. L. 208); S. C., 4 Scott's N. R. 244, it had been held that an action lay against a party for so negligently constructing a hay-rick on the extremity of his land, that in consequence of its spontaneous combustion his neighbor's house was burned down, but no reference whatever was made to any statute. The observations of Lord DENMAN in *Filliter v. Phippard* are such as to cast great doubt upon the correctness of the conclusion of Blackstone and others of high authority (Lord LYNTHURST, *supra*), as to the proper construction and effect of the statute of Anne. He says it is true that, in strictness, the word *accidental* may be employed in contradistinction to willful, and so the same fire might

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both begin accidentally and be the result of negligence; but he also says and declares as in his opinion the true construction, that it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so stand opposed to the negligence of either servants or masters. He holds that the statute does not apply to cases of fires produced by negligence. Now if the statute were applicable as a rule of our common law, it would seem that we could only take it with the construction which has thus been given to it by the English courts. We have seen by the English cases cited and examined in *Kellogg's case* above, that the courts there have never for a moment thought of applying this statute so as to shield or protect railway companies from liability for losses caused by fires set through their negligence or want of proper care, or the negligence or want of care of their agents or servants. The question presented would seem to be one making peculiarly applicable the remarks of Chief Justice MARSHALL in *Elmendorf v. Taylor*, 10 Wheat. 159, that "no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

And again, proceeding upon the supposition that the statute in question was a rule of our law, and that it did, and was intended at the time of its enactment, to excuse negligence so that no action could be maintained, we should venture the suggestion with strong expectation that it would generally be assented to as correct, that the rule so enacted would be inapplicable to the case of a railway company. It would need no argument to show that railway engines, moving at the greatest velocity and conveying their fire through the length and breadth of the land, and which with the utmost precautions for the safety and protection of property, and with the obligation of great care imposed on their managers, are still very dangerous, were not within the contemplation of the framers of the statute. No such machinery was then known, nor was it invented and thus put to use until more than half a century after the act was passed. It would seem, therefore, to be a great stretch of construction to apply the statute to such a case. Hence, in no view we can take of these English statutes, do they seem to afford the slightest ground for relieving the railway company from responsibility for the injurious consequences produced by its own negligence. The question whether neg-

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ligence as to the construction and management of a locomotive is to be implied from the mere fact of fire having escaped from it by which property is destroyed, so as to cast the burden upon the company, of showing that it was properly constructed and properly managed, is one with respect to which there seems to be a clear and decided conflict of authority. The rule of the English courts and that of many of the American States, is that the burden of making this proof rests upon the company when property is thus shown to have been destroyed. *Aldridge v. The Great Western Railway Co.*, 3 Man. & Gr. 515 (42 E. C. L. 272); *Piggot v. Eastern Counties Railway Co.*, 3 Man., Gr. & Scott, 229 (54 E. C. L. 228); *Gibson v. The South Eastern Railway Co.*, 1 Fost. & Finl. 23; *Ellis v. Ports. & Row. R. R. Co.*, 2 Ired. Law, 138; *Herring v. Wil. & Ron. R. R. Co.*, 10 id. 402; *Huyett v. Phil. & Read. R. R. Co.*, 23 Penn. St. 373; *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 387; *Bass v. Chicago, Burl. & Quincy R. R. Co.*, 28 Ill. 9; *Illinois Central R. R. Co. v. Mills*, 42 id. 407; *McGready v. Railroad Co.*, 2 Strobb. Law, 356; *Clevelands v. Grand Trunk Railway Co.*, 42 Vt. 449; *Baltimore & Susquehanna R. R. Co. v. Woodruff*, 4 Md. 242. The reasons in support of this rule are well stated, among others, in the case of *The Illinois Central R. R. Co. v. Mills*. The law upon this subject is that the companies, in the construction of their engines, are bound not only to employ all due care and skill for the prevention of mischief arising to the property of others, by the emission of sparks or any other cause, but they are also bound to avail themselves of all the discoveries which science has put within their reach for that purpose, provided they are such as under the circumstances it is reasonable to require the companies to adopt. *Dimmock v. North Staffordshire Railway Co.*, 4 Fost. & Finl. 1063. The reasons given for requiring the companies to show that this duty has been performed on their part, are that the agents and employees of the road know, or are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character, whilst, on the other hand, persons not connected with the road and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and cannot be obtained by them without great trouble and expense, and then often only as a favor from the company, which, under the circumstances, the company would be very likely to withhold. These considerations

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seem to this court to afford very clear and satisfactory grounds in support of the rule, and inasmuch as this court has sanctioned the principle, if not the very rule itself, in cases of this kind, in *Galpin v. The Chicago and Northwestern Railway Co.*, 19 Wis. 608, 609, we are not inclined to depart from such principle or to refuse our assent to the rule as held by the cases above referred to. The authorities in opposition to this rule are, it is admitted, quite numerous, and by most respectable judicial tribunals, but as this court cannot approve them, and as reference to them may be obtained from any elementary work of recent date, no further allusion is made to them here.

In the present case the railway company appears to have assumed the burden of showing that at and about the times the fires in question were communicated, its engines were properly equipped and provided with all the most modern and approved appliances for preventing the escape of sparks and fire. The testimony upon this subject was quite full, and, in the judgment of this court, quite satisfactory, if not conclusive, that there was no want of proper care or precaution in this respect on the part of the company. Counsel for the company asked an instruction to the effect that the evidence showed that the engines were in good order, properly constructed and provided with all the usual appliances in use at the time of the occurrence of the fires, etc., thus withdrawing that question from the consideration of the jury, which instruction the court refused to give. It seems to be supposed by counsel for the plaintiff that the very utmost strictness of proof is required upon this point, coming down to the very moment when the fire escaped, and showing that at that time there was no defect or want of repair in the engine, or otherwise the company does not rebut the presumption of negligence arising from the fact of fire having escaped. The proof in the case shows, and it is a truth attested by common experience, that by no means, which the ingenuity or cunning of man has yet been able to devise or discover, can the escape of sparks and coals of fire, under such circumstances, be entirely prevented. Some fire, under all circumstances and under even the best condition of the engine to prevent it, will sometimes escape. The presumption, therefore, of negligence or of the want of proper equipments, arising from the mere fact of fire having escaped is not conclusive, nor, indeed, a very strong one, but, of the two, rather weak and unsatisfactory. It is indulged in merely for

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the purpose of putting the company to proof and compelling it to explain and show, with a reasonable and fair degree of certainty, not by the highest and most clear and unmistakable kind of evidence, that it had performed its duty in this particular. Hence, evidence showing that the engines passing over a road were properly constructed and equipped and were subjected to the vigilant and careful inspection of a competent and skillful person, as often as once in two days, and found to be in proper order, would seem to satisfy the requirements of the rule. In this case, therefore, were there no other question in it but upon the refusal of the instruction above referred to, we should have great hesitation in determining that the judgment ought not to be reversed on that ground.

The eleventh instruction or request to charge, asked by the company, was in these words: "The defendant was not bound to burn the dry vegetation on any portion of its way, when, by reason of the direction and force of the wind, or other attendant circumstances it would endanger its own property or the property of others to do so." This request was refused and an exception taken. It seems to have been taken for granted on the trial below and in this court, that the only or the most practicable and useful method resorted to by railway companies to remove the dry grass and other combustible materials such as forest leaves, etc., accumulating on the right of way, is, under the supervision of the workmen, to burn them in the way on either side of the track, thus making a non-inflammable belt, the land on both sides being burned over, from the track to the fences or boundaries of the company's land on either side. To carry on this operation with safety, many things must be taken into account, and especially the course of the wind when that is blowing. The fire must be set to the windward of the track so that it will be carried in the direction of the track, which will operate to interrupt its passage, and not be taken in the direction of the adjoining fields on the side where set, from which mischief and the destruction of property might ensue. There was some evidence and enough, we think, to have carried the question to the jury, whether the failure of the company to remove in this way the dry grass and leaves from the place where the fire is shown to have been communicated, was or was not negligence or an omission of duty on its part for which it should be held to respond in damages to the plaintiff in this action. The duty of removing such inflammable materials from the way owned by the company, implies as of course that the company

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is to have reasonable time and opportunity for that purpose, if the accumulation of such materials be unavoidable, or if not suffered or caused by the neglect of the company. It appears that the fires here occurred in early spring and soon after the grass and leaves became dry and inflammable, and there was some evidence tending to show that, owing to the direction and force of the wind, which the witnesses say blew most of the time in the same direction, and owing also to some peculiarities of exposure at that point, it being upon the edge of some timber land which was covered with dry leaves, no reasonable and fair opportunity had yet been afforded to the company or to the workmen in its employ, to burn off the way on that side of the railroad track. The testimony tended also to show that the workmen had been previously engaged, as time and opportunity were presented, in burning off the way in both directions from that point, but had not burned there for the reasons above stated. The testimony fails to show that there was any other fit or feasible means of removing the combustible materials than by burning, to which the company should have resorted when that method became impracticable. The testimony does not clearly show that no reasonable opportunity had been presented for burning at that place, but it tends to show that, and at the same time to show that it was a place more than ordinarily exposed to danger from fire, and which on that account should have received the earliest attention practicable on the part of the workmen and servants of the company. On the whole, we are of opinion that the testimony was such that it should have been submitted to the jury to say whether there was any negligence on the part of the company in this particular or not, and that the instruction under consideration should for this reason have been given. For this error the judgment must be reversed.

Several other questions have been raised and discussed by counsel in argument, but it is impossible for this court now to consider and determine them, although some of them might with propriety be so considered and determined. An interesting question touched in argument is that respecting negligence actual or contributory on the part of the land owner who suffers combustible materials like dry forest leaves to accumulate on his own land, which are forced and drifted by the wind upon the right of way of the company, and there set on fire, to his injury, or to the injury of the company or others. What the liability of the company may be with respect to such owner for injuries thus sustained by him, and what its obligation

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with respect to him and to others whose property may in this manner become exposed, to remove the inflammable substances so driven and carried upon its way, will be interesting questions when they arise, but it is unnecessary to consider them here. No question of the kind seems yet to have come up for adjudication, except that presented by the windrow of weeds and tickle grass in the case of *Brown v. Han. & St. Joseph R. R. Co.*, 37 Mo. 288, 298, which involved a somewhat similar point.

Judgment reversed and a venire de novo awarded.

ROWAN, plaintiff in error, v. STATE.

(80 Wis. 120.)

Criminal law. Separation of jury. Constitutional law. "Due process of law."

On the trial of an information for murder, which lasted through five days, the jury was permitted to separate for meals and at night and during one Sunday. The defendant was convicted of manslaughter. *Held*, that in the absence of proof that this separation of the jury worked no harm to the defendant the verdict was void and should be set aside and a new trial granted.

A constitutional provision that no person shall be held to answer for a criminal offense "unless upon presentment or indictment of a grand jury," was amended by substituting the words "without due process of law." *Held*, that a statute subsequently passed giving courts jurisdiction to try prosecutions for felonies upon information, was not in contravention either of the constitution as amended or of the fourteenth amendment of the constitution of the United States.

ERROR to the municipal court of Milwaukee county.

The plaintiff in error was convicted in said court, of manslaughter in the first degree upon the following information: "I, C. K. Martin, district attorney for said county, hereby inform the court that on the twenty-eighth day of April, in the year one thousand eight hundred and seventy-one, at said county, James Rowan did willfully, feloniously, and of his malice aforethought, kill and murder Charles McKenzie, against the peace and dignity of the State of Wisconsin. I, C. K. Martin, district attorney for said county, hereby further inform the court that on the twenty-eighth day of April, in the year one thousand eight hundred and seventy-one, at said county.

the said James Rowan did willfully and feloniously kill and slay Charles McKenzie, against the peace and dignity of the State of Wisconsin." The facts of the case appear in the opinion. Verdict and judgment against the defendant.

Samuel Howard & J. P. C. Coltrill, for plaintiff in error.

S. S. Barlow, attorney-general, for the State.

COLE, J. [After deciding some preliminary questions.] After verdict, a motion was made for a new trial on various grounds, only one of which do we deem it necessary to further notice. It appears from the bill of exceptions, that the trial lasted five days and was adjourned over one Sunday. It further appears that during the recess of the court, both at noon of each day and each night, and from the 26th to the 28th day of August (the trial continuing through the 29th), the jury separated, and were thus not kept together from the commencement to the close of the trial. It is claimed by the plaintiff in error that this separation vitiated the verdict, and constituted a legal ground for setting it aside and granting a new trial. It appears to us that this position is sound and must prevail. There does not seem to be any controversy about the fact that the jury were permitted to separate as above stated. Doubtless it was within the knowledge of the court, since it is so stated in the bill of exceptions, as a part of the history of the trial. Neither was there any proof made on the part of the State that this separation of the jury worked no harm to the plaintiff in error. The law upon this subject was settled in this State in the case of *Keenan v. State*, 8 Wis. 132. In that case Chief Justice WHITON, after referring to the conflict of opinion upon this question, says: "But we think in trials for capital offenses, the better rule is, to hold that unless it appears that the separation of the jurors was not followed by improper conduct on their part, nor by any circumstances calculated to exert an improper influence on the verdict, the verdict should be set aside in case of conviction." This decision is strictly in point upon the question we are considering. It is answered on the part of the State, that this is not a capital case, and that therefore the rule in regard to the separation of the jury does not apply to it. That rule, it is said, was established in *favorem vitæ* exclusively. In this case the information contained what under the

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former practice would be called a count for murder, and also one for manslaughter. And as already observed, the plaintiff in error was found guilty of manslaughter in the first degree. The case in all its features is precisely like that of *Keenan v. State*, and it is impossible to make any distinction between them. We do not feel inclined to disturb the rule of that case, and it is manifest if it is applied here, it is entirely decisive upon the question before us. So that we are compelled to hold that there must be a new trial in the case on account of the separation of the jury during the trial, and because of the misdirection of the court as to what constituted the statutory offense of manslaughter in the first degree. However, in ordering a new trial, *ex necessitate*, we disaffirm the points made on the motion in arrest of judgment. But it is due alike to the great importance of those questions as well as to the ability and learning displayed by counsel on both sides, in the argument, that we indicate to some extent our views upon them. And it is insisted on behalf of the plaintiff in error:

1st. That chapter 137, Laws of 1871, in so far as it allows an information to be filed and a party to be put on trial thereon *for felony*, contravenes the provisions of section 8, article 1 of the constitution of this State.

2d. That the same law, in so far as it allows an information to be filed, and a party put on trial thereon *for felony*, contravenes the 14th amendment to the constitution of the United States.

3d. That section 12 of chapter 137 contravenes that portion of section 1, article 1 of the constitution of this State, which provides that in all criminal prosecutions the accused shall enjoy the right * * * to demand the nature and cause of the accusation against him."

The first clause of section 8, article 1 of the constitution originally declared that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury." This clause was amended in 1870 so as to read, "no person shall be held to answer for a criminal offense without due process of law." Chapter 137 of the Laws of 1871 provides that the several courts of this State shall possess and may exercise the same power and jurisdiction to try prosecutions upon information for all crimes as they possess and may exercise in cases of like prosecution upon indictment. This is a prosecution upon an information under this exactment.

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Now the first point above stated, really raises this question: Does the amendment change in any way the force and meaning of the original section of the constitution? It is claimed by the counsel for the plaintiff in error, that the words "*due process of law*," as used in the amendment, meant simply this, that no person shall be tried for a felony, except "*on the presentment or indictment by a grand jury*." It is very evident that if this argument is sound, the amendment to the constitution has no force or value whatever, and is a mere nugatory act. It is certainly a fact that cannot be controverted, that this amendment was agreed to by a majority of the members elected to each house of two successive legislatures, and was submitted to, and approved and ratified by the people at a general election. And it is absolutely certain that the sole and only object was to abolish the grand jury, or to change the constitutional provision which required that all prosecutions for felony should be upon presentment or indictment by a grand jury. This was the sole purpose of the amendment. Now the proposition that an amendment thus agreed to by the members of two legislatures—ratified by a vote of the people—confessedly intended to do away with the necessity of prosecuting for all crimes and felonies by indictment—has changed nothing, and means nothing, but leaves the original provision of the constitution really in force—or rather has merely re-enacted and re-adopted it—is a proposition which surely strikes the mind with some surprise. And yet this is the result of the argument founded upon the language used in the amendment to the 8th article of our constitution. It is an elementary rule, in the construction of statutes, and especially in the construction of so solemn an instrument as a written constitution, to give some effect, if possible, to every part of it. This rule would of course be overthrown by a decision that the amendment amounted to nothing, or rather had precisely the same legal effect and meaning as the original section. What meaning, therefore, is to be attached to the words "*due process of law*," as found in this amendment to our State constitution, will appear from our remarks upon that language, as found in the 14th amendment to the constitution of the United States. The clause in the latter amendment bearing upon this question is: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without *due process*

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of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

The exposition of the proper meaning of the words “*due process of law*,” as found in the constitution of the United States and in the constitutions of many States of the Union, is a subject which has frequently engaged the attention of courts and legal writers. And the definitions of these terms, as found in the authorities, are far from being in accord and completely applicable to all the cases which have arisen. Chancellor KENT says: “The words, *by the law of the land*, as used originally in Magna Charta in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord COKE, is the true sense and exposition of these words. *The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice.*” 1 Com. (10th ed.) 601. Sedgwick on Stat. and Con. Law, 531, remarks that perhaps, in most respects, there is nowhere to be met with a better definition of the phrase, than that found in the argument of Mr. Webster, in the Dartmouth College case, which is: “By the law of the land is more clearly intended the general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that any citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. Every thing which may pass under the form of enactment is not the law of the land.” Judge COOLEY thinks this definition “is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry, and render judgment only after trial.” Limitations, p. 354. In *Mayo v. Wilson*, 1 N. H. 53, a case which involved the validity of a statute which authorized the arrest, by the selectmen, of persons suspected of traveling unnecessarily on Sunday, the court construed the phrase “*the law of the land*” as used in the bill of rights in the constitution of New Hampshire; and RICHARDSON, C. J., said he had no doubt the words meant the same thing and not an equivalent expression to the phrase *by due process of law*, and he illustrated its meaning as follows. No subject shall be arrested but by the law of the land; that is, by *due process of law* warranted by the constitution, by the common law adopted by the constitution and not altered, or by statutes made in pursuance of the constitution. Thus if the house of represen-

tatives were to commit or arrest a person for a contempt in their presence, it would be by process of law expressly warranted by the constitution. If this court were to arrest a person for a contempt in its presence, it would be by process of law warranted by the common law adopted by the constitution. When an individual is arrested for traveling on Sunday, it is by process warranted by a statute made in pursuance of the constitution," p. 58. See also *Dartmouth College v. Woodward*, id. 111, 129. In *Wynehamer v. The People*, 13 N. Y. 378, Judge COMSTOCK defines the terms "*law of the land*" and "*due process of law*," to mean "that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but when they are held contrary to the existing law or are forfeited by its violation, then they may be taken from him — not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the State," p. 393; see opinions of Judges JOHNSON and SELDEN in the same case, pp. 416–433. In *Taylor v. Porter*, 4 Hill, 140, and in *Embury v. Connor*, 3 Comst. 511, the expressions are expounded by Judges BRONSON and JEWETT, who concur in the opinion that the phrase *due process of law* imports at least a judicial trial, and not a mere declaration of legislative will by the passing of a law. There is a very able discussion of the equivalent expression "by the law of the land," in the case of *Jones v. Robbins*, 8 Gray, 329. In that case it was held that a statute which gave a single magistrate authority to try an offense punishable by imprisonment in the State prison, without presentment by a grand jury, was unconstitutional, because violative of the provision in the bill of rights, which declared that no person should be deprived of his life or liberty "but by the judgment of his peers, or the law of the land." There is, however, in this case a dissenting opinion by Mr. Justice MERRICK, in which he reviews a great many authorities and demonstrates quite satisfactorily to my mind, at least, that the phrases "by the law of the land" and "by presentment or indictment of a grand jury," had not acquired, nor been adjudged anywhere to be equivalent or synonymous expressions.

It would be a very laborious task, and would really serve no useful purpose to refer to all the authorities where the expressions "by due process of law," "by the law of the land," "on presentment or indictment by a grand jury," have been considered and defined. But the result of the better opinion of courts and commentators in

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this country, in respect to the meaning of the words "by due process of law;" "by the law of the land," as used in the constitution of the United States and in various State constitutions is, that they are equivalent expressions, and in the language of Judge BRONSON, cannot and do not "mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property." *Taylor v. Porter, supra*, 147. Thus, the larger and better definition of those terms, spoken of by Chancellor KENT, is that they mean "law in its singular course of administration, through courts of justice." And the object of this limitation upon the powers of the States is to secure to every person within their jurisdiction, irrespective of color or previous condition, "the equal protection of the laws," and that every one should be judged and have his rights determined by the same rules which are applied to settle the rights of the rest of the community. The historical origin of the 14th amendment to the constitution of the United States is familiar to all persons in this country. Prior to its adoption there was a class of persons in the States which on account of the state of public sentiment were particularly exposed to oppressive and unfriendly local legislation. They were liable to be despoiled of their property, or to be deprived of their rights, privileges and immunities in an arbitrary manner, and without "*due process of law*." And the object of this amendment was to protect this class especially from any arbitrary exercise of the powers of the State governments, and to secure for it equal and impartial justice in the administration of the law, civil and criminal. But its design was not to confine the States to a particular mode of procedure in judicial proceedings and prohibit them from prosecuting for felonies by information, instead of by indictment, if they choose to abolish the grand jury system. And the words "*due process of law*," in this amendment, do not mean and have not the effect to limit the powers of the State governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and if the people of the State find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our State constitution as it now

stands, and nothing in the 14th amendment to the constitution of the United States, which prevents them from doing so.

The 12th section of chapter 137 provides that "in indictments or informations for murder or manslaughter, it shall not be necessary to set forth the manner in which or means by which the death of the deceased was caused, but it shall be sufficient in any indictment or information for murder, to charge that the accused did willfully, feloniously and of his malice aforethought, kill and murder the deceased; and in any indictment or information for manslaughter, it shall be sufficient to charge that the accused did feloniously kill and slay the deceased." The information in this case conforms to this provision fully and precisely. It is claimed, however, by the counsel for the plaintiff in error, that this section is invalid, because by the 7th section of the bill of rights the accused is secured the right "to demand the nature and cause of the accusation against him." We do not perceive any thing in chapter 137 which deprives him of that right. The information plainly, substantially and formally describes the crime of murder and manslaughter. It does not contain all the verbiage and tautology found in the old forms. Nor do we think this necessary. The statements that the accused "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," with force and arms, at, etc., in and upon one—in the peace of God, etc., then and there being, etc., and many other allegations in the old forms of indictment no longer serve any valuable purpose, either for aggravation or embellishment. The safety and rights of the accused will not be compromised or endangered by the omission of all such useless averments and recitals. The information clearly states "the nature and cause of the accusation" against the accused. He is charged with the crime of murder and manslaughter. The particular instrument or means used to produce death are not stated, and the law renders it unnecessary. The means by which a homicide is committed may be material in determining the grade of the crime, but they can hardly be said to constitute an essential part of "the nature and cause of the accusation." The killing of a human being with premeditated design to effect the death of the person killed, is *murder*, whether death is produced by poison, stabbing, shooting or by any other means. And when a person is charged in the manner prescribed in section 12, chap. 137, with the crime of murder, he is fully informed of the nature and cause of the accusation against

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him. The means or method by which death was produced could not always be proven as laid in the indictment, and sometimes the variance was held to be fatal. It was doubtless to avoid the consequences of a variance and for the purpose of dispensing with many useless averments in the old forms of indictment, that the legislature prescribed the forms found in this enactment. We can really see no substantial objection to this legislation.

These remarks dispose of all the questions which we have deemed it proper to notice at this time.

The judgment of the municipal court must be reversed, and a new trial ordered.

STATE V. MARTIN.

(20 Wis. 216.)

Criminal law — autrefois acquit — new trial.

Defendant was tried upon an indictment for murder, and was found "not guilty of murder, but guilty of manslaughter in the second degree." Upon a new trial upon the same indictment, granted upon his own motion, held that he could not be convicted of murder.

INDICTMENT for murder. The opinion states the case.

S. S. Barlow, attorney-general, for the State.

Johnston & Rietbrock, for defendant.

COLE, J. This cause has been reported by the judge of the first circuit, under section 8, chapter 180, R. S., in order to obtain the decision of this court upon certain questions of law arising upon the trial. The report is made at the request of the defendant, and the circuit judge states in his certificate that he considers these questions of such importance and so doubtful as to require the decision of this court upon them.

It appears from the record sent up by the court below, that the defendant was tried at the October term, 1870, of the circuit court for Racine county, upon an indictment which charges him, in apt

words, of having murdered one Derrick West, to which indictment he interposed the plea of not guilty. Upon that trial the jury expressly found the defendant "*not guilty of murder, but guilty of manslaughter in the second degree.*" The defendant moved the court to set aside this verdict and grant a new trial upon certain affidavits which tended to show that one of the jurors who tried the cause was not an impartial juror. This motion was granted. Subsequently the defendant made an application for a change of the place of trial to another county, upon the ground that the people of Racine county were so prejudiced against him that he could not have a fair and impartial trial. The application was founded upon his affidavit. The court granted the motion and changed the place of trial to Walworth county. At the September term, 1871, of the circuit court of the latter county, the defendant was again tried upon issue made up prior to the first trial—there being no further arraignment of the defendant or plea on his part. The jury upon the second trial found the defendant *guilty of murder in the first degree*, the court having instructed them that they might so find if satisfied from the evidence, that the facts attending the homicide warranted such a verdict. And the first question now submitted by the circuit judge for our decision is:

"The defendant having been once tried upon the indictment in this cause, and having been found not guilty of murder, but guilty of manslaughter in the second degree, was it competent to try him again upon the same indictment and convict him of murder in the first degree—the new trial having been granted upon his motion as above stated?" We are of the opinion that this question, both upon principle and authority, must be answered in the negative.

The doctrine is well settled in this State, that courts have the power to grant a new trial after conviction, for good cause, upon the application of the defendant, and that no principle of the constitution or of the common law, which is essential to the protection of the rights of the individual, is violated thereby. The general rule is that one trial and verdict protect the defendant against any subsequent accusation, whether the verdict be for or against him, and whether the court is satisfied with the verdict or not. Cooley on Cons. Lim., p. 326; *Gee v. Keenan*, 7 Wis. 695; *State v. Kemp et al.*, 17 id. 669. But a person already convicted may waive the constitutional protection against a second prosecution, and ask for a new trial to relieve himself from the jeopardy which he is in. And when

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he does so, what ought to be considered the extent of his application? Is it to expose himself to the possible conviction of a charge of which he has been acquitted, or is it to relieve himself of the one of which he has been convicted? It would seem that a bare statement of the proposition was sufficient to furnish the proper answer. It is not in accordance with the principles of human conduct for a person to ask a further trial of a charge of which he has already been found guiltless by a verdict of a jury. But he seeks deliverance from one of which he has been convicted, and hence he asks that he may again be put upon trial for this charge. In this case the defendant was expressly acquitted of the charge of murder upon the first trial, and convicted of a lower crime. He asked for, and obtained a new trial. A new trial of what? Of the charge of which he had been convicted, or the one of which he had been acquitted. Is it reasonable to suppose that the defendant asked for another trial in order to determine whether he had committed the crime of murder, or was it merely to determine whether he was guilty of manslaughter in the second degree, of which he stood convicted? The answer would seem to be plain upon the principle that it was the latter charge alone that he asked to have retried, and that his application for a new trial should be held to apply to this and not to the higher crime of which he was acquitted. And this is in accordance with the great weight of judicial opinion upon this subject. Most of the authorities are referred to in the arguments of the attorney-general and of the counsel for the defendant, and "with two or three exceptions, they concur in the doctrine that the effect of a new trial in such cases, is only to subject the party to a trial for the offense of which he has been convicted; and that the verdict of acquittal remains unaffected." *State v. Rofs*, 29 Mo. 32-42. Mr. Bishop, in his work on criminal law, states the rule very clearly, as follows:

"The waiving of a constitutional right, implied in the making of an application for a new trial, is not construed to extend beyond the precise thing concerning which the relief is sought. If, therefore, the verdict finds a prisoner guilty of a part of the charge against him, and not guilty of another part, as, for example, guilty on one count of the indictment, and not guilty on another count; or there being one count, guilty of manslaughter, and not guilty of murder; and a new trial is granted him—he cannot be convicted on the second trial, of the matter of which he was acquitted on the first."

1 Bishop's Crim. Law, 4th ed., § 849. In accordance with this and other authorities to the same effect, I therefore think the defendant, by applying for and obtaining a new trial, is not to be held to have waived all the advantages of the verdict acquitting him of the higher crime, but that so far as that offense is concerned, he may claim the benefit of the constitutional provision which declares that "no person for the same offense shall be put twice in jeopardy of punishment." Art. 1, § 8, Const. Wis. It is, however, contended that there is some inherent difficulty in the application of this rule of law to the case before us, growing out of the entirety of the verdict. Here, it is said, there is but one crime charged, in one count of the indictment, and but one defendant, and that consequently if that part of the verdict which found him guilty of manslaughter in the second degree is set aside, *ex necessitate*, that portion acquitting him of murder must share the same fate."

It is very familiar doctrine that upon this indictment for murder in the first degree, the defendant might, in the first instance, have been convicted of any lesser grade of homicide, because the less offense is included in the greater. When there are several counts in the indictment, and the defendant is found guilty on one and acquitted on the others, there is no difficulty in confining the new trial to the count upon which he was convicted. So it is obvious, on an indictment for murder, the attention of the jury may readily be confined to the charge of manslaughter in the second degree, even where there is no count charging that offense, if the defendant was convicted of that crime on the first trial. There is no more difficulty in giving effect to the verdict of acquittal in the one case than in the other. What substantial reason is there for holding, that because there is only one count in the indictment, and the defendant is convicted thereon of a less offense, than that principally charged, by applying for and obtaining a new trial he exposes himself to the whole charge, while the rule is, that where there are different counts in the indictment, upon some of which the defendant is acquitted, on the new trial he is not liable to be tried on the whole indictment, but only upon those counts upon which he was first convicted? There is no valid ground for making a distinction in the two cases. "The granting of a new trial, on conviction of one offense, has no connection with the verdict of acquittal of others, and the latter may well be allowed to stand and have effect though the former should be set aside." *Jesslie v. State*. 18 Ohio St.

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390-395. The first verdict, in the present case, need not necessarily be treated as a unit or one entire thing, but as several in its nature, acquitting the defendant of the charge of murder and convicting him of manslaughter in the second degree. What inherent difficulty is there in so regarding it, and attaching to it all the legal consequences incident to this view of the matter?

When several persons are charged in one indictment with the same offense, and there is a verdict acquitting some and convicting others, there is no pretense that the verdict is such an entire thing that it cannot be set aside as to those convicted, without vacating it as to those acquitted. And it seems to me there is really no difficulty in treating the first verdict in the present case as one acquitting the defendant of the charge of murder, and that this portion of it remains in force, notwithstanding the fact that he moved for a new trial and obtained it. Such motion for a new trial could only properly apply to the inferior crime of which he had been convicted. And the verdict for the purpose of determining for what offense the defendant can constitutionally be a second time tried, must be treated as divisible in its nature.

But again, it is insisted by the attorney-general that the defendant cannot have the benefit of the acquittal of murder on the first trial because he did not plead and offer evidence of the same on the second trial. To this objection the counsel for the defendant answers that it is never necessary to plead or prove that which appears upon the face of the record in the case itself; that the defendant had no opportunity to plead the acquittal, because he was re-tried on the issue first formed without any second arraignment; and that if the defendant lost the benefit of the former acquittal by reason of not being arraigned and not pleading, it was the fault of the prosecution, which failed to arraign him.

Whether it would have been proper practice to arraign the defendant the second time, and have him plead to the indictment, we shall not stop to inquire. It is sufficient to say that the defendant was not arraigned, and, therefore, could not plead the former acquittal. And in order to have the protection afforded by the constitutional provision, he must have the benefit in some way of the proceedings upon the first trial. If there was any fault it was certainly that of the State in omitting to arraign him a second time, so that he might plead the verdict of acquittal. As the case now stands, it would be most unjust to deprive him of all the bene-

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fit of that verdict. An examination of the cases will show that sometimes there was a plea setting up the former acquittal of the higher crime as a bar to any further prosecution for that grade of offense, while in other cases no such plea was interposed. There is no settled practice upon the point, and it is surely in accordance with the dictates of reason and the spirit of the constitution to permit the defendant to avail himself of the verdict acquitting him of murder, under the circumstances of this case.

The cause must be certified back to the circuit court of Walworth county, with our decision upon the questions submitted.

So ordered.

[The remainder of the opinion disposes of some unimportant questions of evidence and as to the instructions.]

MEISWINKLE v. JUNG, appellant.

(80 Wis. 351.)

Promissory note — surety — usury.

A surety on a promissory note is not discharged by a usurious agreement between the maker and the payee for an extension of time.

ACTION upon a promissory note for \$1,700 with interest at ten per cent, executed by the defendants, Jung and McCullough, to the plaintiff. McCullough answered that he had agreed with the plaintiff to extend the time of payment six months upon payment to plaintiff of \$50, which he had paid. Jung answered that he signed the note as surety, and that it had been extended six months without his knowledge on payment by McCullough to plaintiff of \$50, and that in consequence of such extension and McCullough's subsequent insolvency, he had been unable to secure himself against his liability on the note.

The evidence as to the alleged agreement for extension of the time of payment of the note was conflicting. Upon this point the judge charged the jury as follows: "If you find then that there was an agreement on the part of the plaintiff to extend the time of pay-

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ment of this note you must find that some other money than that indorsed on the note, was paid by McCullough and received by the plaintiff, Meiswinkle. It is essential to the validity of this defense that you shall find, not only that the plaintiff in this case agreed to extend the time of payment beyond the maturity of the note; but it is essential that you should find that an actual payment of money was made, and received by the plaintiff in consideration for such agreement." Verdict for plaintiff against defendant Jung, and a new trial having been refused, Jung appealed from the judgment.

I. W. & G. W. Bird, for appellant.

D. F. Weymouth, for respondent.

DIXON, C. J. If the position assumed by Judge BRONSON, in *Vilas v. Jones*, 1 N. Y. 286, and argued and enforced with the great ability usually characterizing his opinions, and concurred in by the chief judge, JEWETT, and not controverted by the other members of the court, be correct, then the facts stated in answer to this action, and the facts proved, or which the evidence on the part of the defendants tended to prove, all taken as true, constituted no defense whatever to the claim of the plaintiff as against the defendant Jung, who was the surety upon the note. Our statute against usury, in force when the alleged agreement for the extension of time of payment was made, was in substance, and probably in very words, the same as that of New York, of which Judge BRONSON was speaking. It declared void *all* contracts infected with usury, and provided that the person paying the same, or his personal representative, might recover back treble the amount. Laws of 1860, chap. 160, §§ 3, 4; 1 Tay. Sta. 838, 839, §§ 3, 4. The position taken by Judge BRONSON was that the agreement to pay usury, whether *executed* or *executory*, was equally null and void, and consequently could not constitute a valid agreement for the extension of time, or the basis or consideration upon or out of which any binding promise for that purpose could arise or be created. In the present case, the promissory note, for the extension of the time of payment of which it is claimed the defendant McCullough, without the knowledge, privity or assent of his co-defendant Jung, either paid or agreed to pay the plaintiff the sum of fifty dollars, drew interest by the terms of it at

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the rate of ten per cent per annum until paid, which was the highest rate of interest allowed by law. Any agreement, therefore, to pay the plaintiff any greater sum, for forbearance or delay of day of payment, than the sum specified in the note itself, was clearly usurious. In this all the authorities agree. If McCullough actually paid the fifty dollars, it was a usurious agreement executed. If the fifty dollars were not paid, it was a usurious agreement merely executory.

It would not be easy for us, were we disposed to make the attempt, to answer the reasoning of the learned judge, by which he endeavors to show that there can be no distinction between a usurious contract executed and one which is executory, so far as its invalidity or want of force as an agreement extending the time of payment is concerned. If his conclusion was correct, and we are unable to say it was not, it is decisive of this case in any light in which it may be examined. But as shown by the opinion, there are cases which hold a different rule where the usurious interest has actually been paid. It has been decided that the law will not assist the creditor by whom it has been received, to take advantage of his own wrong, in order to escape from its consequences. *Tudor v. Goodloe*, 1 B. Monr. 322; *Kenningham v. Bedford*, id. 325. Judge BRONSON denies the correctness of those decisions, especially under a statute like that of New York and the statute of this State on the subject of usury. But the same court by which those decisions were made holds an executory agreement to pay usury or interest beyond the rate prescribed by law, totally inoperative and void as an agreement to extend time of payment. In this, therefore, there seems to be no conflict whatever of authority. *Pyke's Adm'r v. Clark*, 3 B. Monr. 262; *Scott v. Hall*, 6 id. 285.

In the present case, one of the principal grounds of error assigned, is that the court instructed the jury that they must find that the fifty dollars was actually paid by McCullough, and received by the plaintiff Meiswinkle, to authorize a verdict in favor of Jung, finding that he was discharged from his obligation as surety by virtue of the agreement. Upon that question there was a conflict of testimony, and the jury must have found that the fifty dollars was not paid. It is contended that the court should have charged the jury that the mere promise to pay the fifty dollars was a sufficient consideration for the agreement to extend, and that such agreement was effectual to secure the extension bargained for, or intended to be.

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We have seen that this position is wholly untenable. The promise to pay in the future was utterly void, declared so by statute, and so of course could not constitute the consideration of any agreement whatever. The plaintiff could have brought suit upon the note the next moment; or the surety could have paid it, and immediately sued the principal; or, if such an action will lie in this State, as I suppose it will, he might at once have maintained his action *quia timet*, requiring the principal to make payment of the note.

It was no error, therefore, of which the surety can complain, for the court to charge the jury as it did, or to refuse to charge that an unexecuted agreement, void for usury, could yet be valid and operate as a sufficient consideration for an agreement to extend time of payment.

The other errors assigned are of minor consideration, and were so treated by counsel at the bar. In the view which we are inclined to take of the law, that the usurious agreement was at all events utterly void, whether the fifty dollars was paid or not, and that so the engagement, whatever it may have been, to extend the time of payment, was *nudum pactum* and void for want of consideration, all the other errors complained of became manifestly immaterial, and cannot have the effect of reversing the judgment.

We are disposed, therefore, to dispense with the further consideration of the case, and of the other questions presented upon this ground, and to say that the judgment of the court below should be affirmed.

Judgment affirmed.

HOGAN, plaintiff in error, v. STATE.

(80 Wis. 428.)

Criminal law. Indictment. Verdict.

Upon the trial of an indictment for murder not charging any particular degree, the jury returned a verdict of "guilty," specifying no degree. The statute divided murder into two degrees. *Held*, that the verdict was bad, and that no judgment could be rendered on it.

THE plaintiff in error was indicted for murder, was convicted and sentenced to imprisonment in the State prison for life. He sued

out a writ of error to review the judgment below. The material facts on the only point in the opinion deemed important are stated in the opinion.

Gillet & Taylor, for plaintiff in error.

S. S. Barlow, attorney-general, for State.

LYON, J. [After deciding some unimportant preliminary questions.] The remaining branch of the case relates to the validity of the judgment and sentence.

The indictment contains but a single count, and is in the usual common-law form of an indictment for murder. That is to say, it contains the usual averments of time, place and means, and avers also that the murder charged was committed by the plaintiff in error, "feloniously, willfully and of his malice aforethought," but fails to charge in express terms that it was perpetrated from a premeditated design to effect the death of the person killed, or of any person. The verdict was a general one of "guilty," without finding the particular degree of murder of which it convicted the plaintiff in error.

A very important question presented by this record for determination is, could the court lawfully proceed to judgment and sentence on the verdict?

The statutes of this State, defining and punishing the crime of murder, are as follows:

"§ 1. The killing of a human being, without the authority of law, by poisoning, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, excusable or justifiable homicide, according to the facts and circumstances of each case.

"§ 2. Such killing, when perpetrated with premeditated design to effect the death of the person killed, or of any human being, shall be murder in the first degree; and the person who shall be convicted of the same shall be punished by imprisonment in the State prison during the life of the person so convicted.

"When perpetrated by an act eminently dangerous to others, evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree, and shall be punished by imprisonment in the State prison for life.

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“ When perpetrated without any design to effect death, by a person engaged in the commission of any felony, shall be murder in the third degree, and shall be punished by imprisonment in the State prison not more than fourteen nor less than seven years.” Taylor’s Statutes, 1826.

Except that, in 1853, the punishment for murder in the first degree was reduced from death to imprisonment for life; such has been the law of this State, concerning the crime of murder, ever since the enactment of the Revised Statutes of 1849.

An examination of the above statutes will show, that murder in the first degree is the unlawful killing of a human being with *express* malice aforethought, that is, with premeditation and deliberation, while murder in the second and third degrees is such unlawful killing with *implied* malice aforethought, that is, the malice which the law implies from the depraved mind and recklessness of human life in the one case, and from the felonious act in which the slayer is engaged, in the other case. Laying aside, for further consideration, the question, whether any conviction for murder, with express malice or murder in the first degree, can be had on this indictment, it seems very clear, under all the authorities (and they are very numerous), that it is sufficient to sustain a conviction for murder, either in the second or third degree. After a very diligent search, I have been unable to find a single adjudged case to the contrary in any State in which, as in this State, murder is recognized, treated and punished as an offense by the common law. In some of those States where the procedure in criminal cases is purely statutory, as is believed to be the case in Ohio, Iowa and Indiana, and, perhaps in some others, a different rule may prevail.

The indictment under consideration fails to show, by apt and proper averments, the degree of murder charged against the accused. The general verdict of guilty necessarily fails to establish the degree of guilt. It is quite impossible to ascertain from the indictment and verdict whether the jury found the plaintiff guilty of one degree of murder or another degree. Yet the court has assumed that he was, at least, found guilty of murder in the second degree, and has adjudged him to suffer the punishment which the law has affixed to that degree of criminality. It may be that the jury only found the accused guilty of murder in the third degree, and that they intended nothing more by the verdict. In that case the accused should be imprisoned for a term not more than fourteen, nor less

than seven years. But the court has in effect adjudged him guilty of the crime in the second degree, at least, and has sentenced him to imprisonment for life. Thus it may be that he is being punished for a degree of crime of which he has never been convicted. It seems to me that there cannot be any rule of law, the application of which can possibly lead to such a result. The court must be able to say from the indictment and the verdict together, what is the precise crime of which the accused has been convicted; and where a crime has been divided into degrees, and the punishment thereof graduated according to the degree, the court must, in like manner, be able to determine the degree of such crime, or no valid judgment can be pronounced. In many of the States, their statutes require the jury to find the degree of murder of which they convict the accused, and in those States, probably nothing would excuse the omission so to find. But in this State, where we have no such statutory provision, it is probable that a general verdict of guilty on an indictment which, by apt and proper averment, charged a particular degree of murder, and but one degree thereof, would be sufficient to sustain a judgment and sentence for the punishment affixed to that degree; for in such case the court would be informed by the indictment and verdict, of the specific degree of murder of which the accused had been convicted. But, as we have already seen, we have no such case before us. We have here no data from which we can determine whether the plaintiff in error has been convicted of murder in the second degree, for which he is undergoing punishment, or of murder in the third degree. Under these circumstances, I have no doubt whatever, that this judgment which consigns the plaintiff in error to the State prison for life, when it cannot be demonstrated by the record that he has been convicted of any crime or degree of crime to which the fearful penalty is by law affixed, is erroneous and should be reversed.

The authorities are almost uniformly in accord with the views here expressed. Indeed, I find but two cases which hold the opposite doctrine. These are the cases of *Fitzgerald v. The People*, 37 N. Y. 413; and *Kennedy v. The People*, 39 id. 245. The doctrine laid down in those cases is well stated by Judge WOODRUFF, in his opinion in the latter case. He there declares that under an indictment for murder, substantially in the form of the indictment in this case, "there may be a conviction of murder in the first degree, or in the second degree" (there being but two degrees of

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murder in that State), "or of manslaughter, according to the description of the act given and proved; and that the statute is not a rule of pleading, but a guide to the conduct of the trial, and to the instructions to be given to the jury; and *therefore*, that a general verdict of guilty, as charged, is a conviction of murder in the first degree, and warrants a sentence of death, its legal penalty."

From the doctrine of these cases, I must be permitted to dissent. I may, perhaps, agree that the statute is not a rule of pleading, but a guide to the conduct of the trial, and to the instructions to be given to the jury; but I am quite unable to perceive how any such conclusion, as that stated by the learned judge, can be logically deduced from the premises. How a general verdict of guilty, on an indictment which does not show the degree of the crime, but which will sustain a conviction of murder in either degree, can be held to be a conviction of murder in the first degree, is beyond my comprehension. What argument or reason can be urged in favor of that view, that is not equally as good to maintain the proposition that such general verdict is only a conviction of the second or third degree of the offense? I know of none. Indeed, the latter proposition seems more in accordance with the humane principle of our law, which, in favor of life or of liberty, resolves all reasonable doubts in favor of the accused.

I do not care to comment further on these cases in New York. Believing that they cannot be sustained upon principle, I choose rather to adopt the doctrine laid down in nearly all of the adjudications in this country upon the subject, and I hold, therefore, that the judgment of the circuit court in this case is erroneous, for the reasons and upon the grounds above indicated, and must be reversed.

Many of the cases upon this subject are referred to in 2 Bishop on Crim. Procedure, § 565, No. 4.

It should, perhaps, be remarked here, that, probably, many of the observations which I have made upon the necessity of specifying in the verdict the degree of crime of which the jury find the accused guilty, are not applicable to convictions for manslaughter, for the reason that, in addition to the specific punishment affixed by law to each degree of that crime, there is a provision affixing a punishment to the crime generally, without regard to the degree thereof. "Every person who shall commit the crime of manslaughter shall be punished by imprisonment in the State prison, not more than

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ten years nor less than one year." Taylor's Stats., 1830, § 30. I see no good reason why a general conviction for that crime, without specifying in the verdict the degree thereof, may not be sufficient under that provision to sustain a judgment. But it is to be distinctly understood, that we do not decide this point.

What will be the effect of a reversal of this judgment? In a similar case in Pennsylvania, and also in another in Iowa, no new trial was awarded, but the accused was sentenced for the lower degree of murder. *Johnson v. Commonwealth*, 24 Penn. St. (12 Harris) 386; *The State v. McCormick*, 27 Iowa, 402.. If we follow that practice here, we should remand the case with direction to the circuit court to sentence the plaintiff in error for the crime of murder in the third degree. But an insuperable objection to that course is, that we do not know from this record, that he has ever been convicted of that degree of murder. I think that there should be a new trial, to the end that if a conviction follows, the degree of criminality may be ascertained.

Judgment reversed and new trial awarded.

MORSE V. THE HOME INSURANCE COMPANY, appellant.

(30 Wis. 493.)

Constitutional law. Removal of cause to Federal court. Foreign corporation.

A statute required foreign insurance corporations, before doing business within the State, to agree not to remove into the federal courts any suits brought against them in the State courts. *Held*, that the statute was constitutional. (See note, p. 587.)

ACTION on a policy of insurance issued by the defendant upon the steamboat "Diamond," running upon the Fox and Wolf rivers. The opinion states the case. Verdict for plaintiff. Defendant appealed.

Finches, Lynde & Miller, for appellant.

Gabe Bouck, for respondent.

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DIXON, C. J. This is an appeal by the insurance company upon which but two questions are presented, and after very full arguments by counsel and a careful examination by ourselves, we are quite satisfied that both were correctly decided by the court below.

The first question is as to the validity of so much of the act approved March 14, 1870, and of the agreement of the defendant company filed under it as declares that "it shall not be lawful for any fire insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless * * * * such company desiring to transact any such business as aforesaid, by any agent or agents in this State, shall first appoint an attorney in this State, on whom process of law can be served, *containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal courts*, and file in the office of the secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." Laws 1870, ch. 56, § 22; 1 Tay. Sta. 958, § 22. The company here having made and filed the agreement and transacted business in this State under it, attempted, when this action was commenced, to repudiate it and to remove the suit to the United States circuit court, in violation of its own deliberate promise, and one of the express conditions upon which it had been permitted to transact such business. The language of its stipulation was: "and said company agrees that suits commenced in the State courts of Wisconsin *shall not be removed by the act of said company* into the United States circuit or federal courts."

Both the act and agreement are attacked upon constitutional grounds. It is said that both the constitution of the United States and the laws of congress provide for such removals, and that any legislation on the part of the States calculated to hinder or prevent them in cases otherwise proper, is unconstitutional and void. It may be conceded that any State legislation intended or calculated *of itself, or by its own mere force*, to defeat or prevent the exercise of the right of removal where it exists, would be unconstitutional and void. It may be conceded that if congress in the exercise of its plenary power had withdrawn all jurisdiction from the State courts in the class of cases to which this belongs, that is, as "between citi-

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zens of different States," that then State legislation of the kind here in question could not be sustained. If, under the constitution and laws of the United States, exclusive jurisdiction of suits between citizens of different States were given to the courts of the United States, then it might well follow that the State courts could get no jurisdiction by waiver or by express consent, whether such waiver or consent was procured by aid of State legislation or not. In that case consent could not confer jurisdiction. But the constitution of the United States does not provide, nor has the congress as yet enacted that the Federal courts shall have exclusive jurisdiction in such cases. On the contrary, the constitution recognizes, and so do the laws of congress, expressly, that the State courts may and shall continue to exercise jurisdiction in all such cases, except where the power of removal has been conferred upon the non-resident suitor, and he has seen fit to avail himself of it by compliance with the regulations of congress, enacted in that particular. But as yet this is a mere privilege bestowed on account of the relationship of being a citizen of another State, and which such citizen may exercise or not, at his mere will and pleasure, and the question here would seem to be whether it is a privilege of a kind capable of being waived by the party in whose favor it exists, or such that he may by stipulation or covenant, deliberately and fairly entered into beforehand, bargain away or estop himself from setting up or taking future advantage of it.

And the question thus presented differs very widely from those put by counsel, by way of attempted illustration of the supposed unconstitutionality of the act, and of the agreement entered into under it. The question differs very widely from that which would be presented, were this the case of a natural person, a citizen of another State, endowed with the full rights of an individual, and subject to no disabilities. It is not a question of the same kind at all, in substance or effect, as it would be if the act and agreement involved the violation of some positive law of congress, as a law relating to taxation by the United States, or laws regulating trade, commerce and navigation, or the carrying business between the different States. Instead of being an obnoxious, an unconstitutional act and agreement of that kind, it is one which relates to and only proposes to deal with and take away, *by consent of the party having it*, a mere personal or individual privilege, conferred by law of congress, and which such party is and always has been at full liberty to

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accept or reject as he may see fit, or think for his interest to do. The illustrations of the learned counsel fail, therefore, by reason of the essential differences of the cases. The mistake seems to be in supposing cases alike, which are materially and intrinsically different.

The question comes back, therefore, to one of competency on the part of this company to waive or surrender a right or privilege which it had, and which it could accept or reject as it chose, and also to one of power on the part of the State legislature to exact such waiver or surrender as one of the conditions of permitting the company to do business in this State.

As to the first point, or that of competency to waive, we suppose it is too late to question at this day that a party may, under proper circumstances, waive any right, even a constitutional one, in matters of a civil nature, and especially that this may be done by a corporation which is the mere creature of the legislative power, and subject to such conditions and restrictions as the legislature deems proper to impose. It was so held by this court in *Burrows v. Bashford*, 22 Wis. 103, and for reasons which there sufficiently appear, and also in *Darge v. The Horicon Iron Manufacturing Company*, id. 417-421, where it was decided that a corporation created under a law of this State could not be heard to object that a provision of its charter was unconstitutional or invalid, because it gave a beneficial right of appeal to the opposite party in a suit or proceeding, and at the same time gave the corporation only a nominal and unproductive right of appealing from the same judgment or decision. It was held that having organized and acted under the charter, so far as to take the property of the plaintiff in that suit, the company was precluded from then objecting to the validity of its provisions prescribing what the remedy against the company should be. In other words, it was held that the company having accepted and acted under its charter, and received the benefits of it, had accepted also the burdens and disabilities which it imposed, and waived what otherwise might have been a constitutional right or valid objection to the provision. See also cases there cited; *The People v. Murray*, 5 Hill, 468; *Van Allen v. The Assessors*, 3 Wall. 573; and *Dunmore's Appeal*, 52 Penn. St. 374.

And it would seem on authority that there are very few rights and privileges of this nature respecting the remedies of parties to contracts and civil actions, and to the time, place and mode of trial and of entering or of causing judgment to be entered against the party

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in default, which may not be the subject of express waiver. It was held, for example, by this court in *Ladd v. Hildebrant*, 27 Wis. 135, 146 (9 Am. Rep. 445), that a party to an action might waive a future contingent right, such as, before trial in ejectment, the right to a second trial given by the statute, in case judgment in the first should go against him. It was there said that a party may waive a future contingent right as well as one which he expressly has. But a very strong case upon this point is that of *Bank of Columbia v. Oakley*, 4 Wheat. 235, where it was held that an act of the assembly of Maryland, incorporating the bank of Columbia, and giving to the corporation a summary process by execution, in the nature of an attachment against its debtors, who had by an express consent, in writing, made the bonds, bills or notes by them drawn or indorsed, negotiable at the bank, was not repugnant to the constitution of the United States or of Maryland. The objection urged was that the act contravened the article in the constitution of Maryland, which secured the right of trial by jury in all cases at common law, and also the seventh amendment to the constitution of the United States, which secured the same right in suits at common law, where the value in controversy exceeded twenty dollars, but the same was overruled on the ground of waiver, and because the defendant by giving his note payable at the bank had voluntarily submitted to the special jurisdiction created by the act.

The court say: "Was this act void as a law of Maryland? If it was, it must have become so under the restrictions of the constitution of the State or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights. It must have been against the acts of others. But, to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privations of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note payable at the bank of Columbia, the debtor chose his own jurisdiction; and in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of

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justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in admiralty, whose voluntary submission to the jurisdiction of that court subjects him to personal coercion. It is true, cases may be supposed in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long before it could sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. See also *Arnet v. Insurance Co.*, 22 Wis. 516.

We are fully persuaded, therefore, that the right to remove this cause to the Federal court for trial was one which the defendant might waive and relinquish. We can perceive nothing in the policy of the law, either State or Federal, which should forbid or prevent it. As already observed, it was a mere individual or private right, given for the benefit of the defendant, and to be exercised or not at its option, and whether the cause remained in the State court by stipulation, or went to the Federal court without, or because no stipulation had been made, was not a matter which in any manner infringed the policy of the Federal government, or concerned or involved the dignity or independence of its judiciary. It was a matter which concerned the particular rights and interests of the parties to the action and no one else.

And as to the point of the power of the State legislature to pass such an act, the supreme court seems also to have very clearly and definitely settled that. In *Bank of Augusta v. Earle*, 13 Peters, 519, it was decided that a corporation created by one State had no power to do any corporate act in another State, unless by the express or implied consent of the latter. And in *Paul v. Commonwealth of Virginia*, 8 Wal. 168, the court use this language: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

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This seems decisive of the point and to preclude the necessity or propriety of further discussion, especially when it is considered that the act does not purport to operate upon, or bind the foreign insurance company on the subject of removal, except *by its assent* freely and voluntarily given. As observed in *Bank of Columbia v. Okely*, it was with a view to the voluntary acquiescence of the foreign insurance company, nay, its solicited submission to the law of the contract, that this exclusive remedy in the State courts was given. By making and filing the agreement in the office of the secretary of State, the company chose its own jurisdiction, and, in consideration of the rights and privileges extended to it, of transacting business within the State, voluntarily relinquished the power and privilege of removal to the Federal courts. As observed by the supreme court of Michigan in *The Glen Falls Ins. Co. v. The Judge of the Jackson Circuit*, 21 Mich. 580 (4 Am. Rep. 504), a case fully in point upon the question here under consideration, the powers thus exercised by foreign insurance companies under our laws are the same as if they were incorporated by our laws, and they become, *pro tanto*, Wisconsin and not foreign corporations, for all practical purposes in this State. If, as decided in *Darge v. The Horicon Iron Manufacturing Company, supra*, the legislature may impose as a condition upon a corporation of its own creation, that it shall not have the right of appeal from an assessment by commissioners, or a judgment against itself, or the right of trial by jury, and such corporation cannot be heard to complain, or if, as decided in *Van Slyke v. The State*, 23 Wis. 655, and in *Bagnall v. The State*, 25 id. 112, both since affirmed on error in the supreme court of the United States, taxes may be annexed to the franchise as a royalty for the grant, or consideration for the corporate powers given, where otherwise no taxes could be levied or collected, it would be very strange, we say, if similar conditions or restrictions could not be imposed upon a foreign corporation in consideration of the license or permission granted to it to transact business within the State. Considering that the foreign corporation has no power to do any corporate act in this State except by the assent, express or implied, of the legislature, and that it derives its whole power and authority to do so from the latter, it necessarily follows that the legislature has the same power and all the power and control over it that it has over a corporation of its own creation.

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(The remainder of the opinion relates to the question whether certain portions of the Fox and Wolf rivers are navigable.)

Judgment affirmed.

NOTE. — See *contra*, *Morton v. Mutual Life Ins. Co.*, 7 Am. Rep. 505 (105 Mass. 141).

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appellant.

(80 Wis. 534.)

Fire Insurance — construction of policy.

A steamboat was insured against fire by a policy conditioned to be void "if gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude, or refined coal oils are kept or used on the premises without consent." *Held*, that the use of kerosene oil to light the boat did not forfeit the policy.

ACTION upon a policy of insurance to recover for the destruction, by fire, of the steamer "Berlin City." The opinion states the case. Verdict for plaintiffs, and a new trial being refused, defendant appealed.

Felker & Weisbrod, for appellant.

Gabe Bouck, for respondent.

LYON, J. This is an action upon a policy of insurance issued by the defendant to the plaintiffs upon the steamboat "Berlin City," insuring the same against loss or damage by fire. The policy contains the following condition: "If gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude or refined coal, or earth oils, are kept or used on the premises without written consent, this policy shall be void." Kerosene oil was used to light the cabin and saloon of the boat after the policy was issued, and it is claimed that this was a violation of the above condition of the policy, and rendered the policy void. The circuit court held otherwise and directed the jury to return a verdict for the plaintiffs for the amount of the policy. It was admitted by the defendant, that the boat had been

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burned, and that, if the plaintiffs were entitled to recover any sum, they were entitled to recover the full amount of the policy.

The defendant has appealed to this court from the judgment against it, entered pursuant to such verdict.

It is conceded that the judgment should not be disturbed, unless the use of kerosene oil on the boat, as aforesaid, invalidated the policy; and whether the use thereof had the effect by the terms of the policy, is the only question to be determined on this appeal.

We suppose it will not be disputed that naphtha, benzine or benzole, and kerosene, are all "refined coal or earth oils," not differing in their nature, but only in the degree of inflammability, kerosene being much less inflammable than either of the others. From this it would seem to follow, that if a broad and general construction be given to the term "refined coal or earth oils," it must be held to include kerosene, and that the use of that article on the boat vitiated the policy and terminated the contract of insurance. But we are of the opinion that the term should not be so construed. It is used in connection with naphtha and benzine or benzole, kerosene not being specifically named as one of the articles, the use of which will vitiate the policy. The object and purpose of the condition undoubtedly is to decrease the danger of loss by prohibiting the keeping or use of highly inflammable substances, such as naphtha, benzine or benzole, upon the premises insured. The policy expressly enumerates those articles of that character which are more commonly used, as gunpowder, camphene, spirit-gas, naphtha, etc., and then, to fully carry out such purpose and object, and to protect the insurance company from the danger of loss, by reason of the keeping or use of other articles of like character and equally dangerous, it specifies in general terms, as included in the prohibition, "chemical, crude, or refined coal or earth oils." Hence, any article of like character and equally dangerous as those enumerated, although such article is not specifically named in the policy, is within the prohibition. Further than this, we do not think the scope of those general terms in the policy should be extended. In other words, we think that the maxim *noscitur a sociis* is applicable here, and that the term "refined coal or earth oils," as used in the policy, should be construed to mean only those articles or substances which are included in such general description and which are also as highly inflammable, and therefore as dangerous to the insured property, as naphtha, benzine or benzole. An illustration of the application of this maxim may be found in

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Broom's Legal Maxims, p. 451, which is so directly in point, that we feel justified in inserting it here entire. It is as follows :

“ One instance of the application of the maxim, *noscitur a sociis*, to a mercantile instrument, may, however, be mentioned on account of its importance, and will suffice to show in what manner the principle which it expresses has been made available for the benefit of commerce.

The general words inserted in the maritime policy of insurance after the enumeration of particular perils are as follows : and of all perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of said goods and merchandises, and ship, etc., or any part thereof. These words, it has been observed, must be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words ; they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument, and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated, and occasioned by similar causes ; that is to say, *the meaning of the general words may be ascertained by referring to the preceding special words.*”

So in the present case, the construction which we have given to the general words makes them operative to prohibit the keeping or use on the boat of articles not covered by the special words of the policy, while at the same time by referring to the special words to ascertain the meaning of the general words, we give full force and effect to the former. A different rule of construction would render the special words entirely superfluous, for if the term “ refined coal or earth oils ” be construed in its broadest and most general sense, surely it includes naphtha, and benzine or benzole, and the special enumeration of these in the policy adds nothing to its obligations and does not in any manner affect the contract of insurance.

There are many other rules of law for the construction of contracts which are applicable to the question under consideration, and which, it is believed, demonstrate that we have correctly interpreted this contract of insurance. Brief mention will be made of some of them : 1. The contract should be construed in accordance with the intention of the parties to it. Aside from the general words

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employed therein, this policy contains nothing to show that kerosene was intended to be included in the list of prohibited articles. It contains, however, a stipulation that the insurance company shall not be liable for any loss caused by "explosions of any kind." This would, doubtless, in most cases of losses which originated by the burning of kerosene, relieve the company for liability therefor. It is difficult to perceive how a loss could thus originate without an explosion of greater or less force. This clause in the policy would seem to protect the company from the consequences of the improper or careless use of kerosene, and when considered in connection with the fact that kerosene is not specially named as one of the prohibited articles, it raises a presumption that the use of it was not intended to be prohibited. If we may look for the intent of the parties outside of the language of the policy; if it is admissible to ascertain that intent from the situation of the parties, the character of the property insured, and all of the attending circumstances, then it becomes perfectly apparent that neither the plaintiffs nor the agent of the defendant who negotiated for it the contract of insurance, ever supposed for a moment that the use of kerosene on the boat for illuminating purposes would terminate the contract and render the policy void. It was admitted on the trial that kerosene had been in general and universal use for illuminating purposes on boats, and in buildings outside of gas districts for ten years, and the agent of the defendant testifies that he did not understand when the contract was made that the use of kerosene was prohibited by the policy. The circumstances of the case show conclusively that the plaintiffs understood the policy as did the agent. Had the agent, pending the negotiations, informed the plaintiffs that the use of kerosene on their boat would destroy their insurance, does any one believe that they would have paid the premium and taken the policy? Were an insurance company to say to the public, in plain English, that the use of kerosene for illuminating purposes on premises insured by it, would destroy the insurance and forfeit the policy, we apprehend that such company would thereafter issue but few policies, and that future dividends to its stockholders would be exceedingly small.

2. If the language of the policy may be understood in more senses than one, it is to be interpreted in the sense in which the defendant, the insurance company, had reason to suppose the plaintiffs understood it. In that sense we believe we have interpreted it.

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3. Even were it doubtful from the general tenor of the policy, and the relation of the parties, whether the term "refined coal or earth oils" was used in the policy in an enlarged or restricted sense, other things being equal, the restricted construction should be adopted as being most favorable to the plaintiffs, who, in respect to the insurance company, stand in the position of promisees.

4. The contract should have a reasonable construction, reference being had to the circumstances under which it was made. These have already been mentioned and need not be repeated; were we to hold that the use of kerosene is prohibited by this policy, could it not be successfully claimed on the same principle, that the use of matches on the boat, which are prepared with a detonating substance, composed largely of phosphorus, or the use of paints or varnish thereon, one of the component parts of which happens to be benzine, or some other form of "crude or refined coal or earth oils," is also prohibited, and that the use of either would vitiate the policy? Such a construction of the language of the policy would clearly be unreasonable, but no more so, in our opinion, than the construction contended for by the learned and ingenious counsel for the defendant.

5. When the intent is doubtful, conditions providing for forfeitures (and such is the character of the condition of this policy) are to be construed chiefly against those for whose benefit they were introduced.

6. The party to a contract who seeks to destroy its obligations by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture.

The terms of the contract must be clear and explicit in his favor." *Clinton v. The Hope Insurance Company*, 45 N. Y. 454.

A discussion of these principles and references to numerous cases sustaining them will be found in the opinion of the court, Mr. Justice PORTER, in *Hoffman v. The Aetna Insurance Co.*, 32 N. Y. 405.

The foregoing considerations impel us to the conclusion that the judgment of the circuit court should be affirmed.

The counsel for the plaintiffs asks this court to exercise a power vested in it by statute, to award damages against the defendant beyond the seven per cent per annum on the judgment, which the law gives in all cases. 'Taylor's Statutes, 1646, § 47. This request

is made upon the alleged grounds that the appeal was taken solely to harass and delay the plaintiffs.

If the appeal was really frivolous and was taken from sinister and improper motives, the request should be granted, for this power was given to the court to be used in proper cases to discourage appeals of the character just mentioned. But we are not prepared to say that such is the character of this appeal. It presented for the determination of this court a question of great importance both to insurers and insured, and it was very desirable that such question be definitely settled so that parties to similar contracts, in this State at least, might know their rights and obligations in relation thereto. The determination of that question has cost us too much thought and investigation to permit us to say that the appeal ought not to have been taken. In the absence of any satisfactory evidence to the contrary, we choose to believe that the appeal was taken to obtain a decision in this court upon the important question involved in the action, and not for the mere purposes of harassing the plaintiffs and delaying them in the collection of their just claim against the defendant.

Judgment affirmed.

PRUTSMAN V. BAKER, appellant.

(80 Wis. 644.)

Deed — delivery — error.

P. executed a deed of lands to B. and placed it in the hands of S. with instructions to hold it subject to his control until his death and then to deliver it to B. On P.'s death S. delivered the deed to B. *Held*, that there was no valid delivery, and that nothing passed by the deed.

ACTION to set aside a deed. The plaintiff and defendant were heirs at law of David Prutsman, who died intestate. During his life-time, said Prutsman executed the said deed to the defendant, and placed it in the hands of one Sheardown, with instruction to retain it during his, Prutsman's, life, subject to his control, and on his death to deliver it to defendant. On Prutsman's death, Sheardown so delivered it. By virtue of this deed, defendant claimed the en

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ture premises; plaintiff claimed, as heir at law of Frutsman, a portion of the premises. The decision below was, that the deed was void and conveyed no title, and that it be set aside. Defendant appealed.

L. L. Soule and Geo. D. Waring, for appellant.

R. L. D. Potter and S. U. Pinney, for respondents.

DIXON, C. J. An important question of law is presented in this case, which is, whether there was any delivery of the deed by the grantor, David Prutsman, deceased, in his life-time, so as to make the same valid and effectual for any purpose. The testimony on this point is that of a single witness, Sheardown, the depository, who testified on his direct examination: "I asked him (the grantor) what should be done with the papers? He said I should keep them, but not get them recorded while he lived; if he got well he wanted to control them. I kept all the papers until after his death." On cross-examination the same witness testified: "I asked him what should be done with the papers? He answered, take them, record them, and give them to Em, but not while he was living; that if he got well he wanted to control them." And again on cross-examination the witness also said: "The papers were under his (grantor's) control in my hands until he died."

Upon this evidence the judgment of this court very clearly is, that there was in law no delivery of the deed during the life-time of the grantor, for the reason that the grantor intended to and did reserve complete dominion and control over it during his life. To constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed. To do this he must part with the possession of the deed and all right and authority to control it, either finally and forever, as where it is given over to the grantee himself or to some person for him, which is called an absolute delivery; or otherwise he must part with all *present* or temporary right of possession and control, until the happening of some future event or the performance of some future condition, upon the happening or not happening or performance or non-performance of which, his right of possession may return and his dominion and power over the deed be restored, in which case the delivery is said to be contingent or conditional. An essential char-

acteristic and indispensable feature of every delivery, whether absolute or conditional, is, that there must be a parting with the possession, and of the power and control over the deed by the grantor for the benefit of the grantee, *at the time of delivery*.

This is the legal definition and meaning of the term "delivery," as applied to such an instrument. It implies a parting with the possession and surrender of authority over the deed by the grantor at that time, either absolutely or conditionally; absolutely if the effect of the deed is to be immediate and the title to pass or estate of the grantee to commence at once; but conditionally, if the operation of the deed is to be postponed or made dependent on the performance of some condition or the happening of some subsequent event. A conditional delivery is and can only be made by placing the deed in the hands of a third person, to be kept by him until the performance of some condition or conditions by the grantee or some one else, or until the happening of some event, when, upon the performance or happening of which, the deed is to be delivered over by the depositary to the grantee. Conditional delivery also takes place, when, by the terms of the deposit with the third person, the deed is to be returned to the grantor upon the performance of some condition on his part or on the part of some other person, or upon the happening of some contingency or uncertain event at or before some future day, and the like. In fixing the terms and determining the conditions of deposit, it is competent for the grantor or for the parties to enter into such stipulations as they please, and the effect of the deed in the third person's hands always depends upon the interest of the parties, or of the grantor when he alone dictates or fixes the conditions. In some cases the deed is held to operate presently, though placed in the hands of a stranger, with a direction to deliver it to the grantee at some future day or upon some certain event. In such cases, if there be no condition connected with the delivery to the grantee, the happening of which must, by the terms of the authority in the receiver, precede such delivery, the title passes at once to the grantee. It is otherwise, however, where such condition exists, for until that has happened or been performed, or until the event, contingent in its nature, has transpired, the deed is to have no effect.

Cases of the latter description, and those under different circumstances where it is contemplated that the deed may by possibility, or in the course of events, be returned to the grantor, are in truth

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the only ones of conditional delivery, and it is a misapplication of the term where it is employed with reference to any others. As has been well observed, a conditional deed, that is, one delivered conditionally, is not a deed, but an *escrow*, a mere writing having the form of a deed, but the effect of which depends wholly upon the happening of the conditions or events upon which it is to be delivered to the grantee. If these come to pass it becomes a deed, otherwise it is a mere nullity. Where delivery is conditioned upon the performance of some act by the grantee or by some other person, the instrument becomes a deed when the act is performed according to the terms of the deposit or authority conferred upon the receiver. When the condition is for the return of the deed upon the performance of some act by the grantor or by some one for him, and such act has been performed, then the deed becomes forever a nullity, and no delivery of it by the receiver or depositary to the grantee will make it effectual. If, on the other hand, such act be not performed, or the event do not transpire, upon which the instrument was to be delivered back to the grantor, it then becomes his deed agreeably to the stipulation of the parties and the instructions given to the depositary.

Many and perhaps most of the authorities make a distinction between cases where the future delivery is to depend upon the payment of money, or the performance of some other condition, and cases where it is to depend on the happening of some contingency, holding that the former is an *escrow*, but that the latter will be deemed the grantor's deed presently. This distinction will be found, however, not to be in all cases correct, since it will frequently happen that it will defeat the manifest intention of the parties which it is everywhere conceded should govern. The foregoing classification will therefore, we think, for all general purposes, be found more accurately to express the true rules and definitions of the law upon the subject.

And it follows in case of conditional delivery, or where the instrument has been deposited as the writing or *escrow* of the grantor, that it does not become the grantor's deed and that no estate passes until the event has happened upon which it is to be delivered to the grantee, or until the *second* delivery or redelivery, as it is sometimes called, by the depositary to the grantee. Whether in such case actual delivery to the grantee is necessary in order to give effect to the instrument as the deed of the grantor. seems not to be

very well settled, but the inference would appear to be that it is not. The indication from the authorities quite clearly is that it becomes the grantor's deed the moment the condition has been performed or the event has happened, upon which the grantee is entitled to the possession of it, and that thenceforth the depository or holder is regarded as the mere agent or trustee for the grantee.

But the title only passes on performance of the condition or the happening of the event, except in certain cases where by fiction of law the writing is allowed to take effect from the first delivery. This relation back to the first delivery is permitted, however, only in cases of necessity and where no injustice will be done, to avoid injury to the operation of the deed from events happening between the first and second delivery ; as if the grantor, being a *feme sole*, should marry, or whether a *feme sole* or not, should die or be attainted after the first and before the second delivery, and so become incapable of making a deed at the time of second delivery, the deed will be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity. But subject only to this fiction of relation in cases like those above supposed, and others of the kind, and which is only allowed to prevail in furtherance of justice and where no injury will arise to the rights of third persons, the instrument has no effect as a deed, and no title passes until the second delivery ; and it has accordingly been held, that if, in the mean time, the estate should be levied upon by a creditor of the grantor, he would hold, by virtue of such levy, in preference to the grantee in the deed.

The foregoing observations have been made for the purpose of showing, and we think it sufficiently appears from them, that deeds of the kind here under consideration do not fall under the denomination of conditional deeds, or deeds delivered upon condition, but that they rather belong to the class where the delivery of the deed is said to be absolute. They are of the kind, the second delivery, or that to the grantee, being only dependent on the death of the grantor, where the first delivery, if valid at all, is necessarily absolute. Dependent on that sole event, the unalterable nature of the conveyance is manifest. Unlike the case of first delivery, conditioned upon the happening of a contingency or some future event of doubt and uncertainty, or the performance of some act or agreement which may not take place, in order to justify the second, the

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grantor here anticipates that the second delivery will certainly follow, and that by no possibility will the deed ever be returned to him, or his right to the possession or control of it be restored. The assent of the grantee having been given, the grantor's authority over the deed and all his right to possess or control it are forever gone the moment first delivery is made, or when the deed is placed in the hands of the third person. As to the grantor, the delivery is absolute and final, and so is his conveyance of the land, the title to which passes, at once, to the grantee, qualified only by the right of the grantor to use and occupy, or take and receive the rents and profits during his life, or until the event shall have happened, upon which second delivery is to be made. The grantor, in such case, converts his estate into a life tenancy, and makes himself the tenant of the grantee. These conclusions result, unavoidably, from the certainty of the event upon which the second delivery is made to depend, and from the impossibility, under the circumstances, that the grantor will ever be able to recall or re-possess himself of the deed. He delivers the writing, therefore, *as his deed*, always so to remain, and never return to him, and it becomes presently operative and the title vests immediately in the grantee. This is what was intended by Chief Justice PARSONS in *Wheelwright v. Wheelwright*, 2 Mass. 452, and recently approved by the court of appeals in *Hathaway v. Payne*, 34 N. Y. 106, when he said: "If a grantor deliver any writing *as his deed* to a third person, to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee. * * * But if the grantor make writing and seal it, and deliver it to a third person, as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his, the grantor's deed, and it be delivered to the grantee accordingly, it is not the grantor's deed until the second delivery."

In such a case the future delivery merely awaits the lapse of time, and is dependent upon no condition or contingency, and the writing is considered the grantor's deed presently, and the title as having vested in the grantee. *Foster v. Mansfield*, 3 Metc. 412; *Hathaway v. Payne*, *supra*. A quit-claim deed executed by the grantee, intermediate the delivery to a stranger and the grantor's death, will, it has been held, pass the estate. *Tooley v. Dibble*, 2 Hill, 641. In such case, therefore, it is unnecessary, as has been sometimes otherwise supposed, to resort to the fiction of relation in order to make

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the deed available after the death of the grantor. The deed takes absolute effect during the life-time of the grantor, and no fictitious relation is required.

We have said in the first part of this opinion, that so long as a deed is within the control, and subject to the authority of the grantor, there is no delivery for any purpose. A writing cannot be delivered as an escrow even, unless the maker parts with his dominion and power over it until such time as the event has happened when it is to be or may be restored to him. If it is in his own possession, he can of course destroy it at his pleasure, and if in the hands of a third person as his mere agent, and subject to his direction, his power is the same. If this be true of an escrow or conditional delivery, it must *a fortiori* be true where the delivery, if made, would necessarily become absolute. The following are some of the authorities which hold that if the deed is subject to be recalled by the grantor, before delivery to the grantee, it is no delivery on the part of the grantor *Shirley's Lessee v. Ayres*, 14 Ohio, 317; *Fitch v. Bunch*, 30 Cal. 213; *Berry v. Anderson*, 22 Ind. 36; *Cook v. Brown*, 34 N. H. 460. The last is a particularly full and well-considered opinion upon the question growing out of a state of facts not dissimilar to those here presented, and many authorities are reviewed.

Opposed to these decisions we know of but two in this country (*Shed v. Shed*, 3 N. H. 432, and *Belden v. Carter*, 4 Day, 66), in neither of which was the real point of objection discussed or considered. The former we know has been overruled, and we believe also the latter.* In England there have been some decisions and *dicta* to the like effect, as will be seen by examining the oft-cited case of *Doe v. Knight*, 5 Barn. & Cress. 671, 687. In *Welch v. Sackett*, 12 Wis. 265, this court felt obliged to reject what was said in *Doe v. Knight*, rather *obiter* than otherwise, on the subject of presumed acceptance of a deed by the grantee without knowledge that it had been or was to be executed, and now it feels obliged to reject what was in like manner said respecting the validity of delivery, where the deed remains in the grantor's possession or subject to his control. Upon both points the remarks of the court were strictly unnecessary to a decision of the cause and, as we think, also clearly erroneous.

As observed in *Cook v. Brown*, the owner of land desiring to

* See *Stewart v. Stewart*, 5 Conn. 317, 320.—REP.

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make disposition of it at his death, has three courses open to him, either of which he may adopt according to circumstances and as will best suit his convenience and intentions. "If he desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed; or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee. But if he wishes to retain the power of changing the disposition of the property at his pleasure, that can only be properly effected by a will. So long as he retains the instrument, whether in the form of a deed or will, in his power, the property is his."

And so we must say in the present case, that the land in controversy was the property of the supposed grantor, the father of the plaintiffs and of the defendant, at his decease, and that the defendant acquired no title by virtue of the alleged conveyance. It follows, therefore, that the judgment of the circuit court is correct and should be affirmed.

It is so ordered.

ARMSTRONG, appellant, v. GIBSON.

(81 Wis. 61.)

Usury — indorsement.

An indorsement, void for usury, is valid to pass the title of a note to the indorsee, and enable him to collect the note of the maker.

PLAINTIFF indorsed and delivered to the defendant, a note and mortgage securing it, executed by plaintiff's son, T. F. Armstrong, to plaintiff, for \$1,000, with interest at ten per cent. The defendant paid plaintiff for said note and mortgage, \$950, and the plaintiff, as a part of the same transaction, by an indorsement upon the note, guaranteed the payment of the whole amount for which the note and mortgage were given, no part thereof having been paid at the time of the transfer. This action was brought to have the indorsement, transfer and guaranty of said note and mortgage declared usurious and void, and to have the indorsement and guaranty can

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ceded and the note and mortgage returned to plaintiff. The circuit judge held, that the indorsement and transfer were valid to pass title to the securities to the defendant, even though the indorsement and guaranty were usurious and gave judgment for defendant. Plaintiff appealed.

Wm. Brown and C. C. Remington, for appellant.

Crouch & Huntington, for respondent.

LYON, J. The first question to be considered is, whether there was a valid assignment and transfer of the securities to the defendant, conceded that the guaranty of the plaintiff is void for usury.

We do not propose to go into an extended discussion of this question, or to view the decisions of the various courts bearing upon it. Those who may desire to examine such decisions will find many of them, both English and American, cited and most elaborately reviewed in the cases of *Crane v. Hendricks*, 7 Wend. 569; *Cowles v. McVickar*, 3 Wis. 725; and in the able opinion of the learned circuit judge in this case.

In *Cowles v. McVickar*, Mr. Justice SMITH states the law to be, that an indorsement, void for usury, is valid to pass the title to the indorsee, and enable him to collect the note of the maker.

It must be conceded, however, that this remark of the learned justice who wrote the opinion in that case is *obiter dictum*, no such question being involved in the issue. And it may be remarked in this connection, that the question which was presented to the court in that case for adjudication is not necessarily involved in the decision of this case, as will hereafter appear. There the question was, whether the indorsement or guaranty was void for usury. Here, if it be held that the indorsement, whether usurious or not, passes the title to the note so that the indorsee may collect it of the maker, it will be unnecessary, for reasons which will presently be stated, to decide whether the indorsement or guaranty is or is not void for usury. The question under consideration is now for the first time, so far as I am advised, presented directly to this court for adjudication. The decisions of the courts in other States, in England, and in the Federal courts, bearing upon it, are very conflicting, very many of them holding the doctrine asserted in *Cowles v. McVickar*, by Mr. Justice SMITH, and very many others of equal

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authority asserting an opposite doctrine. A review of these conflicting decisions will subserve no useful purpose. We are required to choose between them, and to say which line of decisions contains a correct statement of the law on this subject.

After a careful and somewhat extended examination of the authorities, we have reached the conclusion that the law was correctly laid down by Mr. Justice SMITH, and that the circuit judge held correctly when he decided "that the assignment and delivery of the note and mortgage in question in this suit, by the plaintiff to the defendant, passes the title thereto from the plaintiff to the defendant, and that he is entitled to hold and collect them of the maker."

It is proper to say, however, that we do not intend to express, or even to intimate, an opinion as to the rights or liabilities of the parties in any action which may be instituted by the holder of the note and mortgage in controversy against Theodore F. Armstrong, to enforce payment thereof. By a reference thereto, it will be seen that we have adopted the views of Mr. Justice WILDE on this question in the case of *Knights v. Putnam*, 3 Pick. 184. He uses the following language: "Now it is manifest that the maker of a note is not affected by a usurious agreement between the indorser and indorsee. He is liable on his contract, and it is immaterial to him whether the action be brought in the name of the indorser or in that of the indorsee. But I hold, further, that the transfer of a note on a usurious consideration is neither void nor voidable. So far as the indorsement operates as a transfer of the note, it is an *executed* contract, and the statute against usury is not applicable. It only applies to the implied promise or guaranty of the indorser, which, being an *executory* contract, may be avoided. But in no case can an executed contract be set aside on the plea of usury."

[The remainder of the opinion decides briefly that the plaintiff was not entitled to have his guaranty canceled, and also disposes of a question of practice.]

Town of Depere v. Town of Bellevue.

TOWN OF DEPERE, appellant, v. TOWN OF BELLEVUE.

(81 Wis. 120.)

Municipal corporation — towns — division of — contribution for debts

When a town is divided and a new town created out of a part of the territory, the latter is not bound to contribute toward the payment of debts contracted before the division, in the absence of any statute to that effect. (*See note, p. 604.*)

THIS action was brought by the town of Depere against the defendant, to compel contribution on account of moneys paid by the plaintiff upon obligations incurred at a time when defendant constituted a part of plaintiff's town. The complaint alleged in substance, that both parties were duly organized corporations; that prior to July 1, 1854, the defendant was a part of the plaintiff, and that they both had but one corporate existence under the name of town of Depere; that as such town they did, in pursuance of an act of the legislature, issue the bonds of the said town in aid of a certain plank-road; that the defendant was afterward erected into a separate town; that the plaintiffs have been compelled to pay and have paid large sums of money by reason of the indebtedness so created; that the defendant have paid nothing and refuse to pay any thing thereon; and after stating the assessed valuation of each of the parties, asks judgment, that the defendant be required to contribute its proportion.

The defendant demurred to the complaint and the demurrer was sustained. Plaintiff appealed.

Hudd & Wigman, for appellant.

Easting & Greene, for respondents.

COLE, J. We are of the opinion that the complaint in this case states no cause of action, and therefore that the demurrer was properly sustained upon that ground. It appears from the allegations of the complaint, that, prior to April, 1853, and until after the 1st of July, 1854, the plaintiffs and defendants were included in and formed one town, known as the town of Depere. In 1853, that town was authorized by an act of the legislature to aid in the

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construction of certain roads, and the electors thereof voted for the issue of, and the officers of the town did issue, \$5,000 in town bonds, payable in twenty years, the interest thereon being payable annually according to the terms of coupons attached to each of said bonds. Subsequently, each of the defendants was organized, by a resolution of the county board of supervisors, into a town, out of the territory originally included in the town of Depere when the bonds were issued. Before the commencement of this action the plaintiffs had paid, as interest due on such bonds, the sum of four thousand dollars; and this action is brought to compel a contribution, or a payment by the defendants of such a proportional share of the whole sum due and paid for interest as their territory and the assessed valuation thereof bear to the assessed valuation of the property of the plaintiffs. And the question raised by the demurrer is, can these towns, which were subsequently organized out of the territory originally embraced in the town of Depere, be held liable for a share of the original indebtedness? This question, we think, must be answered in the negative.

It is not alleged in the complaint, nor is it claimed in the argument of the counsel for the plaintiffs, that, in the organization of the defendant towns, any provision whatever was made that they should be liable for the payment of any portion of this debt. Therefore, if they are liable at all, it is because they constituted a portion of the town of Depere when the debt was contracted. But, "by general principles of law, as well as by judicial construction of statutes, if a part of the territory and inhabitants of a town are separated from it, by annexation to another, or by the erection of a new corporation, the remaining part of the town, or the former corporation, retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties; unless some express provision to the contrary should be made by the act authorizing the separation." This is the language of Chief Justice PARKER, in the case of *Hampshire v. Franklin*, 16 Mass. 76-86, a decision which was relied on and followed as an authority in *Crawford County v. Iowa County*, 2 Chandler, 14; and which is referred to with strong approbation by the chief justice, when considering an analogous question, in *The Town of Milwaukee v. The City of Milwaukee*, 12 Wis. 93. The case of *Hampshire v. Franklin* is supported by other decisions, not only in Massachusetts but in other States, and we have no doubt is a correct exposition of the law upon this subject. *Windham v.*

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Portland, 4 Mass. 384 ; *North Yarmouth v. Skillings*, 45 Me. 133 ; *Veazie v. Howland*, 47 id. 127.

These principles of law are very clearly announced by Mr. Justice SWAYNE, in *Morgan v. Beloit City and Town*, 7 Wall. 613, to which we were referred by the counsel for the plaintiffs. That was an action in equity against the city and town of Beloit to compel the two corporations to pay certain judgments in the proportion which each ought to pay. The town of Beloit, under an act of the legislature, had made a subscription to the stock of a railroad company, and had issued bonds of the town to pay therefor. Afterward the city of Beloit was created and organized from a portion of the territory which had constituted the town of Beloit. In the city charter was a provision that all principal and interest upon all bonds which had theretofore been issued by the town, should be paid, when the same or any portion thereof fell due, by the city and town in the same proportions as if the town and city had not been dissolved. Upon the strength of this provision the court entertained jurisdiction, and enforced the remedy against both city and town. And in the opinion Mr. Justice SWAYNE says: "The two corporations are as separate and distinct as if the territories they embrace respectively had never been united. It is obvious that, without a legislative provision to that effect, the city would not be answerable at law for the debts of the town incurred before the former was created. Whether, but for the statute, the city then would have been chargeable in equity, it is not necessary to consider. The statute is conclusive as to a liability to be enforced in some form of procedure." Pp. 617, 618.

It is very obvious that this case is wholly unlike the one before us, where there are no provisions making the defendant towns liable for the debts of the old corporation, and where the remedy sought to be enforced is not at the suit of a creditor, but by the corporation itself, which has only paid the debt it contracted and was bound to pay.

This view disposes of the case, and it is not necessary to notice the other questions discussed upon the argument.

The order sustaining the demurrer to the complaint is affirmed.

Order affirmed.

NOTE. — Where the territory of a municipal corporation is divided and a new corporation erected from a part thereof, the old corporation will be entitled, in the absence of statutory provisions to the contrary, to the corporate property, and will be solely

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answerable for all the liabilities. *Richards v. Daggett*, 4 Mass. 539; *Richland Co. v. Lawrence*, 12 Ill. 1; *Cobb v. Kingman*, 15 Mass. 197; *Blackstone v. Taft*, 4 Gray, 250; *Hartford Bridge v. East Hartford*, 16 Conn. 149; affirmed by supreme court of the United States, 10 How. 511.

In *Plunkett Township v. Crawford*, 27 Penn. St. 107, it was held that on the division of a township each part remains liable for the whole debt of the old town, and that if one pays the debt, it may maintain an action against the other for contribution.

Upon the erection of a new corporation out of a portion of the territory of an old corporation, the legislature may make provision for an equitable division of the property, and may impose upon the new corporation the obligation of discharge a portion of the corporate debts. *Gorham v. Springfield*, 21 Me. 61; *Brewster v. Harwick*, 4 Mass. 278; *Lakin v. Ames*, 10 Cush. 198; *Harrison v. Bridgton*, 16 Mass. 16. — REP.

MELCHOIR v. McCARTY, appellant.

(31 Wis. 252.)

Illegal contract — account stated

It is no bar to an action on an account stated, that the defendant's indebtedness was for liquors sold by plaintiff on Sunday, contrary to law, if the account was not stated on Sunday; but if the sale was illegal for want of a license the action on an account stated could not be maintained.

ACTION on an account stated. Defense that the indebtedness arose from the sale by plaintiff to defendant of intoxicating liquors, made on a Sunday, and that at the time of such sale plaintiff had no license to sell liquors as required by law. At the trial in the circuit court the defendant offered evidence to prove his defense, but it was excluded. Verdict and judgment for plaintiff. Defendant appealed.

Utter & Robinson, for appellant.

B. E. Clark and *S. W. Button*, for respondents.

LYON, J. The general rule of law is, that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void; and that, if a party claiming a right to recover a debt is obliged to trace his title or right to the debt through any such illegal contract, he cannot recover, because he cannot be allowed to prove the illegal contr

foundation for his right of recovery. It is quite immaterial whether such illegal contract be *malum in se*, or only *malum prohibitum*. In either case the maxim, *ex turpi causa non oritur actio*, is applicable. And a contract in violation of a statute is void although the statute fails to provide expressly that contracts made in violation of its provisions shall not be valid. It is sufficient that it is prohibited, and its invalidity follows as a legal consequence.

The cases which affirm these principles are very numerous and uniform. We cite but a few of them. *Swartzer v. Gillett* 1 Chand. 207; *Kellogg v. Lakin*, 3 id. 133; *Bryan v. Reynolds*, 5 Wis. 200; *Fay v. Oatley*, 6 id. 42; *Maxwell v. Reed*, 7 id. 582; *Aetna Ins. Co. v. Harvey*, 11 id. 394; *Miller v. Larson*, 19 id. 463; *Phalen v. Clark*, 19 Conn. 421; *Finn v. Donahue*, 35 id. 216; *Gray v. Hook*, 4 Comst. 449; *Nellis v. Clark*, 4 Hill, 424; *Mills v. Rice*, 6 Gray, 458; *Dodson v. Harris*, 10 Ala. 566; *Pepper v. Haight*, 20 Barb. 429; *Martin v. Wade*, 37 Cal. 168; *Hoover v. Pierce*, 27 Miss. 13; *Day v. McAllister*, 15 Gray, 432; *Toler v. Armstrong*, 4 Wash. C. C. 297.

There are, however, exceptions to the rule that a party cannot recover upon an illegal contract, the grounds of which are thus stated by Lord MANSFIELD in *Clarke v. Shee*, 1 Cowp. 197: "There are two sorts of prohibitions enacted by positive law in respect of contracts. 1st. To protect weak or necessitous men from being overreached, defrauded or oppressed. There the rule, *in pari delicto potior est conditio defendentis*, does not hold, and an action will lie; because, where the defendant imposes upon the plaintiff, it is not *par delictum*;" and he instances, as an illustration, the case of a bankrupt who pays money to a creditor in consideration that such creditor sign his certificate. In such case, although the bankrupt is a party to the illegal transaction, he may maintain an action to recover back the money so illegally paid, because he is the oppressed party, and not equally guilty with the other. On the same principle, actions have been sustained by wards against guardians, and by clients against attorneys, to set aside executed illegal contracts, where the guardians or the attorneys had taken advantage of the fiduciary relation to impose upon and mislead their wards or clients.

On the same principle, also, statutes against usury frequently give the borrower an action against the lender to recover back the usury which he has paid. Laws of 1859, ch. 160, § 3.

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The selling of intoxicating liquors without license, or on Sunday, is prohibited by law. Taylor's Stat., ch. 35, §§ 5, 20; ch. 183, § 6. Such contracts are not within the exceptions to the general rule above stated. Hence, were this an action on the original indebtedness, the plaintiff could not recover were it made to appear that the debt was for the price of liquor sold without license, or sold on Sunday.

But the action is not, in form, for the original indebtedness, but is upon an account alleged to have been subsequently stated by and between the parties; and it is claimed that the plaintiff is not compelled to resort to the illegal contract to maintain his action, but only to the account stated, which is said to be in the nature of, or equivalent to, a new promise. *Homes v. DeCamp*, 1 Johns. 34.

This brings us to inquire as to the effect of stating an account, or what seems to be the same thing, of a new promise, based upon an original illegal contract. Greenleaf, in his Treatise on the Law of Evidence, says: "In support of the count upon an *account stated*, the plaintiff must show that there was a demand on his side, which was acceded to by the defendant. * * * The admission must have reference to past transactions, that is, to a subsisting debt, or to a moral obligation, founded on an extinguished legal obligation, to pay a certain sum." Vol. 2, § 126. The rule was stated in another form by the late Mr. Justice PAINE, in *Frey v. Fond du Lac*, 24 Wis. 204, as follows: "It is a general rule that a promise to pay for a past consideration, for which there is not and never has been any legal liability on the part of the party promising, does not make a contract binding in law. It is placed on the same footing with a promise which does not purport to be for any consideration whatever." The same principle was applied in the case of *Hooker v. Knab*, 26 Wis. 511, and is doubtless sustained by nearly all of the adjudged cases. *Smith v. Ware*, 13 Johns. 257; *Western Bank v. Mills*, 7 Cush. 539; *Gray v. Hook*, 4 N. Y. 449; *Chenery v. Barker*, 12 Gray, 345; *Holden v. Cosgrove*, id. 216.

But to the rule last above stated there is an exception of one class of cases. Where a contract, otherwise valid, is void by reason of having been made on Sunday, as where property is sold and delivered on that day on credit, a subsequent promise to pay for the goods, made on any day other than Sunday, is valid, and an action can be maintained on such new promise. The cases are not uniform in stating the reasons for this exception, but they all recognize

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its existence. It is not mentioned in either of the two cases decided by this court, last above cited, and indeed it had no application to either of them. The general rule there stated must, however, in a proper case, be applied subject to this exception. *Williams v. Paul*, 6 Bing. 653 (19 Eng. C. L. 192); *Reeves v. Butcher*, 31 N. J. Law (2 Vroom), 224; *Ryno v. Darby*, 5 Green (20 N. J. Eq.), 231; *Adams v. Gay*, 19 Vt. 358; *Stebbins v. Peck*, 8 Gray, 553; *Smith v. Case*, 2 Oregon, 190.

It necessarily follows, that the circuit court correctly excluded the testimony offered by the defendant to show that the liquor with which he was charged in the account stated was sold to him by the plaintiff on Sunday, but that the testimony which was offered to prove that the plaintiff, when he sold the liquor, had no license to sell the same, should have been received, and its rejection was error.

If the parties stated an account between them, on any day except Sunday, the plaintiff is entitled to recover the amount found due him upon such accounting, unless it be made to appear that the original indebtedness of the defendant was for intoxicating liquors sold him by the plaintiff without license, in which case he cannot recover.

The judgment of the circuit court is reversed, and a new trial awarded.

Judgment reversed.

VOGEL v. MELMS, appellant.

(31 Wis. 303.)

Statute of frauds—promise of indemnity.

Defendant orally promised to indemnify plaintiff for indorsing the promissory note of another, and plaintiff, relying solely upon such promise, indorsed the note. *Held*, that the promise of indemnity was not void under the statute of frauds.

ACTION upon an oral promise made by the defendant, Leopold Melms, to the plaintiff, to indemnify him for indorsing the note of William Melms. The following facts were stated by Mr. Justice COLE:

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“It appears that on the 10th of August, 1870, the plaintiff indorsed the note described in the complaint. This note was executed by William Melms and made payable to the plaintiff's order, who indorsed it in order that it might be negotiated to raise money to enable William Melms to go on with a contract which he had entered into with the city of Milwaukee to build a bridge for the city. The plaintiff was surety for the performance of this contract on the part of William, and it appears that the defendant agreed to advance, and in fact did advance, to his brother William, at different times, over \$4,000, receiving orders on the city covering the full amount of the contract price for building the bridge. William required more money than the defendant could or was willing to advance, and this note was made to raise money, and was discounted at the bank of M. Von Baumbach & Co., of which the defendant was a partner. The plaintiff had to pay the amount of the note so discounted, and brought this action to recover the amount paid. The plaintiff alleges that at the time he indorsed the note, William Melms, the maker, was insolvent, and that he was induced so to indorse it at the special request of the defendant, relying upon his verbal promise to indemnify and save him harmless for any loss he might sustain by reason of such indorsement. The defendant alleges that William Melms was not insolvent at the time of the making of the note, and that plaintiff did not suppose him to be so. He denies that the indorsement was made upon his request and promise; and he also claims and insists that even if this promise was made as alleged, it was a special promise to answer for the debt, default or miscarriage of another person, and was void because not in writing expressing a consideration. On the part of the plaintiff it is claimed that the promise of the defendant was to indemnify and save the plaintiff harmless for indorsing the note, and that this was an original undertaking to which the statute does not apply.

“As bearing upon this question whether or not the promise of the defendant was void by the statute of frauds, the court below instructed the jury that if they found from the evidence that the defendant alone promised to indemnify the plaintiff from any loss by reason of his indorsement of the note of William Melms, and that the plaintiff did therefore indorse it, relying upon the promise of the defendant for indemnity, then the promise was binding in law; and further, if they were satisfied from the evidence that the defendant promised to indemnify the plaintiff and save him harm-

less from the indorsement of the note in question, *and that William Melms also promised to indemnify and save him harmless*, then they must determine *to whom the credit was given*; and if they believe the whole credit was given to the defendant, and that the plaintiff indorsed the note relying upon *his* promise alone, then the plaintiff was entitled to recover."

Verdict and judgment for the plaintiff; and defendant appealed from the judgment.

Smith & Stark, for appellant, cited *Birkmyr v. Darnell*, 1 Smith's L. C. 371, and notes, also notes of American editors, 7th Am. ed., 501; *Emerick v. Sanders*, 1 Wis. 93, 97; *Matson v. Wharam*, 2 Term, 80; 3 Parsons on Cont. 21; *Brown v. Weber*, 38 N. Y. 187; *Leonard v. Vredenburg*, 8 Johns. 29; *Mountstephen v. Lakeman*, L. R., 5 Q. B. 613. As to promises of indemnity, 1 Smith's L. C. (6th Am. ed.) 477; *Staats v. Howlett*, 4 Denio, 559; *Wing v. Terry*, 5 Hill, 160; *Rogers v. Kneeland*, 10 Wend. 218, 249; *Mallett v. Bateman*, 16 O. B. (N. S.) 530; *Green v. Cresswell*, 10 A. & E. 453; *Turner v. Hubbell*, 2 Day, 457; 3 Parsons on Cont. 19; 1 Throop on Verbal Agreements, §§ 427, 438.

Butler & Winkler, for respondent.

COLL, J. The only question of any difficulty in this case is that which arises upon the statute of frauds. If the alleged undertaking of the defendant is not a promise on his part to answer for the debt or default of another, within the meaning of that statute, then it is plain the other exceptions taken on the trial, to the sufficiency of the complaint and the admission of the evidence in respect to the insolvency of William Melms, must be overruled.

It appears to us that the instructions given were applicable to the facts which the evidence tended to establish, and the only question is, therefore, whether they were correct as propositions of law. It must be conceded that their correctness is sustained by many respectable authorities, and they are clearly in harmony with the decision of this court in *Shook v. Vanmater*, 22 Wis. 532. In that case the plaintiffs surrendered to Baker securities which they held to indemnify them from loss as accommodation makers of a promissory note signed by them and Baker, which was made payable to one Humphrey, upon receiving from the defendant

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his promise in writing — but expressing no consideration — that he would save them harmless from damages and liabilities in consequence thereof. This promise was held to be an original undertaking, made upon a sufficient consideration, and not within the statute. We were well aware that there was considerable conflict of decision upon this question; but we then thought, and still are of the opinion, that a preponderance of authority sustains the doctrine that a promise to indemnify a surety for becoming responsible for the principal, which is made by a third party at whose request and upon whose credit the surety enters into his engagement, is not within the statute. A number of cases are cited in the opinion in *Shook v. Vanmater* in support of the ruling there made; and it would be very easy to cite more to the same effect. Nor is it difficult to find cases on the other side, which hold that the statute, in words and spirit, embraces this class of engagements. It is evident that a choice must be made between two lines of conflicting decisions, and we have adopted the rule which seemed to us sustained by the weight of authority. The law upon this subject is still quite unsettled even in the English courts, as is strikingly illustrated by the history of a very recent case to which we were referred by the counsel for the defendant, that of *Mountstephen v. Lakeman*, Law Reports, 5 Queen's Bench, 612, where it was held that a promise to be answerable for the debt of another person is within the statute although that other person never becomes legally indebted to the promisee; and that it is sufficient to bring the promise within the statute, that, at the time the promise is made, the promisor and promisee expect that a legal obligation toward the promise will be incurred by a third person. Yet it is stated in the American Law Review for April, 1872, p. 591, that this case has been reversed in the exchequer chamber, where WILLES, J., in delivering judgment, after quoting the note to *Birkmyr v. Darnell*, 1 Salk. 27, "From all the authorities it appears, conformably to the doctrine in that case, that if the person for whose use the goods, etc., are furnished, be liable at all, any other person's promise is void except in writing,"— adds: "That may very well be modified to the extent of adding the words, if he be liable at all, or if *his liability be made the foundation of the contract between the plaintiff and the defendant.*"

But the doctrine of the case of *Shook v. Vanmater* is decisive of the case before us, since, under the instructions, the jury must have found that the defendant promised to indemnify and save the plain-

tiff harmless from the indorsement of the note in question, and that the plaintiff did indorse it, relying upon this promise alone, and there can be no doubt there was a sufficient consideration for this promise, if we are right in assuming that it is an original, independent undertaking on the part of the defendant, and not collateral to any thing promised by William Melms. It is true, the counsel for the defendant attempted to distinguish this case from that of *Shook v. Vanmater*, on the ground that here the promise of indemnity was contemporaneous with the liability incurred by the surety, while in that case such promise was to indemnify against a liability theretofore incurred. But we do not perceive any satisfactory reason for making a distinction on that ground. Prof. PARSONS, in his work on contracts, 3d vol. (5th ed.), p. 25, note (*p*), says: "It has been made a question whether a promise by A to indemnify B for guarantying a debt due from C to D is within the statute. It is clear, upon the authorities already cited, that such a promise is not within the statute as being a promise of answer for the debt of C. For that purpose it must have been made to D, to whom the debt was due. * * * The question would seem to depend upon the time when the promise of C, the person for whom the guaranty was given, arises. And this, again, will depend upon the particular circumstances of the case. If these are such as to authorize the inference that C made an *actual promise* to indemnify his guarantor at the time when the undertaking of A was given, or prior thereto, the reasonable presumption is, that the promise of A was intended to be collateral. If, on the other hand, there is nothing in the case from which an *actual promise* by C can be inferred, and he can only be liable on a promise raised by operation of law from B having been compelled to pay money on his account, it would seem to be clear that the promise of A must be original. For the promise of C arises upon a subsequent and independent fact, after the promise of A has become a complete and valid contract."

In the case before us, as already observed, the jury must have found that the indorsement was made solely and exclusively upon the promise of the defendant to indemnify the plaintiff against that liability. There is nothing in the case from which a promise on the part of William Melms to indemnify the plaintiff can be inferred. And if there were any thing of the kind, the question has been fairly submitted to the jury on the evidence, and they have in effect found that no such promise was made.

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These remarks substantially dispose of all the questions arising upon the instructions which the court gave, and those which it refused to give at the request of the defendant, except the third instruction for the plaintiff. It is insisted that this instruction was erroneous because it left to the jury to find whether Leopold Melms received or got control of the money which came from the city, while there was no evidence to support such a finding. The court, however, only held that, if the defendant promised the plaintiff that he would use the money which should come into his hands to pay the note and save him harmless for the indorsement thereof, and if the plaintiff, relying upon such promise, did so indorse it, then the defendant was in duty bound to make that application of the funds to the extent of such money received from the city on the bridge contract. We cannot see how the defendant could have been prejudiced by that instruction; for upon the assumption that the defendant did not get any money or control any, there would be nothing in his hands to apply to the payment of this note, and the jury would so find under the direction of the court.

Upon the whole record we think the judgment is correct, and must be affirmed.

Judgment affirmed.

A motion for a rehearing was denied, COLE, J., delivering a brief opinion, citing *Holmes v. Knights*, 10 N. H. 175, as a correct exposition of the law on the question.

GRACE v. MITCHELL, appellant.

(31 Wis. 533.)

Replevin to recover goods seized on execution. Officer — how far protected by process.

An officer, under a general promise of indemnity, but without direction from the execution creditor to levy upon any specified property, seized chattels in execution under a void judgment. In replevin against the officer and the execution creditor, it appearing that the latter never had possession of the goods, *held*, that the action could not be maintained as to him.

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An officer will not be protected by an execution valid on its face if he have notice *aliunde* of some jurisdictional defect which renders the judgment void; but he may, in such case, demand indemnity from the execution creditor.

REPLEVIN against Mitchell and Carney to recover possession of a schooner, its tackle, etc., seized by the defendant Mitchell under an execution issued on a judgment in favor of Carney against Grace as garnishee of one Ward. Mitchell, answering separately, set up the execution in his hands with the necessary averments as to his official character and the regularity of the judgment and execution.

Carney, in his answer, alleged that the taking of the property was by Mitchell, under and by virtue of an execution issued on a judgment in an action by Carney against Grace as garnishee of one Ward, which execution was directed and delivered to Mitchell as constable, that it was regular on its face, and was issued by one Holland, a justice of the peace, on the judgment in said action; and that he did not direct the taking of the property in question, nor in any manner interfere therewith.

On the trial, the docket entries of Justice Holland in the action of *Carney v. Ward*, and in the action of *Carney v. Grace*, as garnishee of Ward, were put in evidence, the jurisdictional defects appearing therein as stated in the opinion. It appeared that before Mitchell levied on the property he was advised by the counsel for Grace that the execution was void, and that he would better, before levying, get a bond of indemnity from Carney. Mitchell thereupon saw Carney and asked for such bond, but instead thereof accepted Carney's oral promise to protect him.

The jury, by direction of the court, found a verdict for the plaintiff against both defendants; both defendants appealed.

Austin & Wallber, for appellants.

Jenkins & Elliott, for respondents.

DIXON, J. Both judgments in the actions commenced before the justice of the peace, Holland, as well that against the principal debtor, Ward, as that against the plaintiff in this action, Grace, as the garnishee of Ward, were void for want of jurisdiction. The justice lost jurisdiction in each action by the adjournment allowed in it after the first, on the mere motion of the plaintiff, in the absence

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and without the consent of the defendant, and without any oath or affidavit therefor having been made or taken. This was prohibited by statute. R. S., chap. 120, § 62, 2 Tay. Stats. 1366, § 68. Jurisdiction in each case was also lost by reason of the omission of the justice to specify and enter in his docket the *place* to which the hearings were adjourned, and in one instance also the *hour* of the adjourned day was omitted. *Crandall v. Bacon*, 20 Wis. 639, and cases there cited. These propositions are not contested. Counsel for the defendants concede that the judgments were *coram non judice*, and void.

The next point of inquiry is as to the liability of the defendant Carney in this form of action. Can replevin be maintained against a party situated as he was with respect to the property replevied? He was not in possession of the property at the time the action was commenced, and had never had possession of it prior to that time. He was plaintiff in the execution issued upon the void judgment, by virtue of which his codefendant, Mitchell, as constable, had seized and was then holding the property. He had caused the execution to be issued, and had delivered it to Mitchell, and had directed him to collect it by levy and sale of any property of the plaintiff in this action not exempt by law from execution. He had given no directions to levy upon any specific property, and did not know the property in controversy had been seized until he was so informed by the constable. The constable, Mitchell, had likewise informed him that the validity of the judgment was questioned — that it was said to be void for want of jurisdiction in the justice of the peace; and had asked him to give a bond of indemnity. He gave no bond, but verbally promised to indemnify and save Mitchell harmless, with which Mitchell was satisfied. He had not the custody or possession, nor any control over the property, other than that which every judgment creditor may be supposed to have under like circumstances. Had he instructed Mitchell to release the levy and surrender the possession, it may be presumed that Mitchell would have done so; for such would be the presumption in every like case where similar instructions were given to the officer. Thus far he may be said to have controlled the motions and been responsible for the actions of Mitchell, but no further. Had the action been brought against him alone, possession of the property could not have been taken from him, either as being in him separately or solely, or because he was jointly possessed with Mitchell or any one else. He had no actual posses-

sion of any kind, either in part or in whole, in severalty or in common ; but the same was exclusively and entirely in Mitchell. Under these circumstances, the question arises, whether this action of replevin can be maintained against him ; and we are quite clear of the opinion that it cannot.

It has been sometimes remarked that replevin is a concurrent remedy, and will lie wherever trespass *de bonis asportatis* will. The remark is not, however, entirely accurate ; for the two actions are not in all cases concurrent. It has sometimes held that where the wrongful taker of property has parted with it, and no longer has it in his possession at the commencement of suit, replevin cannot be maintained, although trespass might ; but the better rule now seems to be that replevin may be maintained in such case as that. *Dudley v. Ross*, 27 Wis. 679, and cases cited. The doctrine of the case just referred to clearly seems to be, that replevin is a concurrent remedy with trespass *de bonis*, whenever the goods wrongfully taken are or *have been* in the possession of the defendant ; and for that purpose actual possession is not always necessary, but a possession merely nominal or constructive will in some cases suffice, as will be seen by examining *Gallagher v. Bishop*, 15 Wis. 276. The full and able opinion and review of numerous authorities by the late Mr. Justice PAINE, in the latter case, explains many points connected with this subject, and renders particular examination here unnecessary. The case here presented with respect to the defendant Carney is the precise one which was presented in *Richardson v. Reed*, 4 Gray, 441, referred to in that opinion, and must be ruled, we think, in the same way. It was there held that a creditor, at whose suit an attachment was made of goods not the property of his debtor, was not liable in replevin for the goods attached, either alone, or jointly with the attaching officer. The reason given was, that the creditor, though liable as a joint trespasser with the officer in an action of trespass or trover, yet could not be sued jointly with him in replevin because he had no possession of the goods. The possession was solely and exclusively in the officer, and the action being partly *in rem*, and in part designed at least to take the goods from the defendant and restore them to the plaintiff, it could not be maintained against one who did not have them in his possession or under his control. Just so we think here, where the defendant Carney had no possession, actual or constructive, at the time the action was commenced nor previously, but the same was and always had been

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exclusively in his co-defendant Mitchell, the officer executing the process, and who took the property by virtue of it. And see also in *Johnson v. Garlick*, 25 Wis. 705, where it was held that an action to recover possession of personal property would not lie against one who was not in the possession and control of it, and who disclaimed title or right of possession upon demand made, pointing out the person in actual possession, although the property was his, defendant's, dwelling-house, and he advised the person in possession not to surrender it. As to Carney the judgment is erroneous, and must be reversed. The motion for a nonsuit should have been granted in his favor, and the court was wrong in directing a verdict against him.

The process of execution in the hands of Mitchell was valid on its face; and thus arises the question whether he was to be deprived of the protection usually afforded an officer by such process, on proof that he received notice *aliunde* of the defect or want of jurisdiction in the magistrate who issued it, and which rendered it in all other respects or for all other purposes null and void. The general principle that an officer having such process is not bound to look behind it and inquire whether the judgment was properly given, and whether the magistrate acted within the scope of his legal powers, is well settled in this State. *Sprague v. Birchard*, 1 Wis. 457, 464; *Young v. Wise*, 7 id. 129; *Bogert v. Phelps*, 14 id. 88; *McLean v. Cook*, 23 id. 364.

But in the case of *Sprague v. Birchard*, speaking of such process, the court say: "That an officer having a knowledge of a want of jurisdiction, but persisting in the execution of the writ, would be held liable, we have no doubt; but in the absence of such knowledge, we cannot think he would be liable, or required to look into the prior proceedings." This is a very plain declaration — rather *obiter* it is true, but nevertheless very plain — that notice to the officer, under such circumstances, of the antecedent jurisdictional defect avoiding the process as to others, avoids in his hands and as to him also, and that he can no longer rely upon its seeming validity, or the authority of law apparently conferred by it, as a defense or protection for any acts which he may afterward do under it. There is something in the language of the opinion in *Bogert v. Phelps* also which hints at the same proposition.

The perilous position in which every officer would be placed resulting from the establishment of this proposition, if at the same

time he could not call upon the plaintiff in the writ to indemnify him and thus to take upon himself the risk and burden of the execution of the process in his favor, or, if the plaintiff chose not to do so, to relieve the officer from responsibility for not executing it, has caused very considerable anxiety in our minds, and has led us to search with some care for authorities and precedents upon this point, wherever such were to be found. If, being informed that a jurisdictional defect exists or is claimed to exist in the prior proceedings, the officer is bound, so far as the rights of the defendant or party opposed are or may be concerned, to look into those proceedings and to take notice of such defect at his peril, or upon such advice as he may receive, then certainly it would seem most proper, nay, indispensable, in case there was reasonable ground for apprehension, that he should have the right to call upon the plaintiff or party interested for indemnity, and that the plaintiff or such party should be required to give it where he insists upon the writ being executed.

If this were not so, the danger and hazards of the position of the officer would be manifest. Bound to know the law, he must decide between the conflicting claimants at his peril. It is said that every person is presumed to know the law, whether in public station or private. Every magistrate and officer is presumed to know it. Certain superior magistrates and officers are exempt from liability if they happen to mistake the law, but it is not so with inferiors. Courts of superior and general jurisdiction can, on grounds of public policy, claim immunity from loss or damage caused by such mistakes when made by them; and certain high officers of government enjoy the same freedom and upon the same grounds, or because the acts complained of are "acts of State." But with the inferior magistrate or officer it is not so. He must respond in damages whenever he chances to fall into a like error or mistake. And this distinction, apparently so unjust, brings to mind a remark I once heard made by a very able and distinguished lawyer, and which had the keenest edge of sarcasm and satirical truth and wit. He said: "*All persons are presumed to know the law and be responsible for their acts, except judges of the courts of superior and general jurisdiction.*" The saying is worthy a place almost among the serious maxims of the law.

But, to return to the position in which the officer would find himself it would be just this. Bound to know the law and to decide

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the question between the contending parties, if he made a mistake and executed the process when he ought not to, he would be responsible in damages to the defendant; but if, on the other hand, his mistake was of a different kind, and he refused to execute the writ when he should, he would be answerable for all loss to the plaintiff. If he decided rightly, it would be well; but as questions of jurisdiction, whether the same has been properly acquired or may have been lost, are often very intricate and difficult, perplexing and doubtful, even to the courts, the chances are he would fall into error. Obligated, under such circumstances, to act at his peril, the difficulties and dangers of his position would be evident, if no means of escape existed through the bond of indemnity. Being himself the mere agent of the plaintiff or party beneficially interested, and having nothing to gain by executing the process, he would still be compelled to incur all the risks for the sole benefit of another. It is proper in such case that the party to be benefited should incur the risks and encounter the dangers which lie in the way of obtaining the benefit; and such, on examination, we find to be the law. In no case can the officer receive security from the defendant or others for not executing the process, since that is against the policy of the law, and all such bonds and agreements are void. *Webber's Executors v. Blunt*, 19 Wend. 188; *Winter v. Kinney*, 1 N. Y. 365; *Connolly v. Walker*, 45 Penn. 449. The officer must, therefore, in a proper case, and, if he demands it, be indemnified by the plaintiff or other party in interest, as seems to have been held in numerous similar cases.

In *Marsh v. Gold*, 2 Pick. 285, the action was upon a verbal promise of indemnity made to an officer, who, having an execution against a manufacturing corporation, arrested a person supposed to be a member of the corporation, but who stated that he was not, and thereupon the officer obtained the promise from the creditor's attorney for committing the party arrested. It was objected that the promise was illegal; but the action was sustained. The opinion of the court was delivered by Chief Justice PARKER, who said: "The objections which rest upon a supposed want of evidence of the promise, or upon the illegality of the consideration proved, we think are not maintained. An officer called upon to serve a precept, either by attaching property or arresting the person, if there be any *reasonable grounds to doubt his authority* to act in the particular case, has a *right* to ask for an indemnity. *He is not obliged*

to serve process in civil actions at his own peril, when the plaintiff is the suit is present, and may take the responsibility upon himself. And it has been decided that the sheriff has a right to require indemnity of the creditor, when he shall be directed to attach chattels, the property in which may be questionable. *Marshall v. Hosmer*, 4 Mass. 63. The same right exists when the sheriff shall be directed to arrest the body of any one, and he has reasonable doubts of the identity of the person. There can be no reason why the same principle should not apply where there may be doubts of authority to arrest *on other* grounds. The cases cited to show the illegality of the consideration of the promise show satisfactorily that a contract entered into with an officer to indemnify him against the consequences of a breach of official duty is void; but it is *no breach* of official duty for an officer to *hesitate* to serve civil process where his proceedings *may make him a trespasser*, until he shall have security of indemnification from the creditor. Actions have frequently been maintained upon such contracts, and they are neither immoral, unjust nor illegal, in any respect." See also *Bond v. Ward* 7 Mass. 125.

Chamberlain v. Beller, 18 N. Y. 115, was a like action upon a bond of indemnity, which it was held a sheriff might lawfully require before executing an attachment upon goods not in the possession of the debtor but of a third person claiming them as his own. The court say: "Now the proof in the present case is, that the officer, in demanding the bond, sought no advantage to himself, but simply desired, as it was natural he should, to protect himself against loss. The risk he was required to run was not for his benefit, but for the benefit of the attaching creditor. If the goods, moreover, as the creditor alleged, were the property of his debtor beyond dispute, he, the creditor, could not be injured by giving the indemnity; and if they were not, it was right that he who, for his own supposed advantage, insisted on the seizure, should take the consequences of the act. Such would seem to be clearly the dictate of common sense and common justice; in other words, in the absence of contrary authority, of common law." The case, like those in Massachusetts above referred to, was decided on the principles of the common law.

And in *Long v. Neville*, 36 Cal. 455, it was decided that when a sheriff goes to execute a writ of possession issued on a judgment in an action to recover land, if he finds other parties in possession than

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those named in the complaint, who claim that they are rightfully in possession, not in privity with the defendant, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may demand indemnity, and, unless it is given, may refuse to execute the writ. This is the law, even if the premises are specifically described in the writ. In that case Mr. Chief Justice SAWYER, delivering the opinion of the court, said: "There are cases, then, in which the sheriff would not be justified in turning out parties in possession, who are not parties to the suit, or named in the writ, even though they may have entered after suit brought; and the question whether a party found in possession when the writ issues, but not a party to the suit, must go out or not, is often one of great nicety. To determine the question, it is necessary that the officer should both accurately ascertain the facts, and then determine the law correctly. In both particulars there is great liability to error. This very case affords an excellent illustration of the embarrassment under which an officer would labor, if he was, in such cases, compelled to decide these questions after a full litigation of the question of the right of the sheriff to turn out Brown under the writ, on appeal and after careful consideration, this court once held Brown could not be dispossessed; but, on rehearing granted, and after a further and mature consideration, it was finally determined by a bare majority of the court that Brown must go out, and on the facts as there presented, that the sheriff was liable for not executing the writ. If the courts after due investigation, with all the means at their command necessary for the purpose, find great difficulty in determining the question, how is a mere ministerial officer, possessing none of their facilities, to ascertain the facts and apply the law correctly? The officer has no personal interest in the matter; and in case of doubt, like the one in question, when the parties in interest are unwilling to take the responsibility and hold him harmless, why should he be compelled to act at his peril? * * * We think it clear that the case afforded reasonable grounds for the sheriff to entertain doubts as to his authority to turn Brown out, and that, upon such doubts arising, he was justified in demanding indemnity from the plaintiffs before executing the writ. He was not bound to determine at his own peril the delicate and important questions of law and fact involved in the claim of the parties, apparently strangers to the suit, in actual possession. If the parties interested were not willing to

take the responsibility, there certainly is no reasonable ground for requiring the sheriff to proceed at his peril for their benefit."

The case of *Commonwealth v. Vandyke*, 57 Penn. St. 34, holds that when there is a claim of property adverse to the defendants, which would raise a reasonable doubt as to title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for indemnity, and if refused, he may ask the court to enlarge the time for his return till indemnity be given. That decision follows the earlier one in *Spangler v. The Commonwealth*, 16 Serg. & Rawle, 68, where what constitute reasonable grounds for doubt and uncertainty, and for demanding indemnity, are discussed and considered. No very slight, unsatisfactory or frivolous grounds will be accepted, or can the sheriff start doubts or raise questions for the mere purpose of delaying or baffling the party entitled to his services, or by connivance with the defendant. It was said in the latter case to be difficult to draw any precise line, but that "a line of justice might be drawn, which, while it protects sheriffs from unnecessary risks, secures plaintiffs from connivance between the sheriff and the defendant in the execution — and that is, that wherever there is a claim of property adverse to that of the defendant, of that kind which would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for a reasonable indemnity."

The foregoing decisions all turned upon common-law principles, and they are indirectly sustained by *Howard v. Clark*, 43 Mo. 344, which arose under a statute.

We are of opinion, therefore, in view of these authorities and of the principles of law laid down in them, that notice to the officer of a jurisdictional defect in the prior proceedings will, in such a case as this, deprive him of the protection afforded by the possession of process appearing fair and regular on its face; and consequently we are of opinion also, that verdict and judgment were properly directed and rendered as against the defendant Mitchell.

Some other exceptions are urged, but they are obviously immaterial in view of this conclusion on the main question.

The judgment is reversed as to the defendant Carney, and the cause remanded with directions that it be dismissed as to him. As to the defendant Mitchell, the judgment is affirmed.

Brigham v. Claflin.

BRIGHAM V. CLAFLIN, appellant.

(81 Wis. 607.)

Bankrupt law — action by assignee in State courts.

An action by an assignee in bankruptcy, under section 35 of the bankrupt law, to recover the value of goods transferred to defendant by the bankrupt in fraud of the provisions of said act, is penal in its character, and will not be entertained by the State courts.

THIS action was brought by Brigham, as assignee in bankruptcy, under the first clause of section 35 of the bankrupt act, to recover the value of a stock of goods alleged to have been transferred to the defendant by the bankrupt in fraud of the provisions of said act, less than four months before the filing of the petition in bankruptcy, in contemplation of insolvency and with a view to giving a preference to the defendants, as creditors, they having knowledge of these facts.

The defendants demurred to the complaint, on the ground that the court had not jurisdiction of the action. The demurrer was overruled and the defendants appealed.

Jenkins & Elliott, for appellants.

Wells & Brigham, for respondent.

COLLIER, J. The questions raised upon the record are highly interesting and important, and have not, so far as we know, ever been passed upon by the supreme court of the United States. We have, therefore, given them all the consideration which our limited time and duty to other causes enabled us to bestow upon them; and I am now to announce the conclusions at which we have arrived upon the questions presented for our decision.

In support of the demurrer the counsel for the defendants insist, that the jurisdiction conferred by the bankrupt law upon the several district and circuit courts of the United States is, in its nature, necessarily exclusive of the State courts; and that, even if the State courts had jurisdiction concurrently with the Federal courts in suits in relation to the property of the bankrupt, they could not exert that jurisdiction in a case like the one before us.

The objections to holding that the State courts had jurisdiction of the cause appeared to me on the argument to be grave, if not insuperable; and all the reflection I have been able to give the subject since has not lessened their weight. One of the most obvious and direct results of the State courts assuming jurisdiction, of course, is to withdraw from the United States district courts a suit instituted for the collection of the assets of the bankrupt—a matter which properly belongs to those courts. The act of congress gives the several district courts original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and expressly authorizes them to collect all the assets of the bankrupt, and to exercise jurisdiction in all matters and things to be done under and in virtue of the bankruptcy. There is surely no indication upon the face of the act of any intention to confer any jurisdiction upon the State courts in matters of bankruptcy, even if it were competent for congress to do so; on the contrary, with the possible exception of suits pending in the State courts in favor of or against the bankrupt at the commencement of the bankrupt proceedings, the natural and reasonable inference is that the jurisdiction is confined exclusively to the courts of the United States. It is true, the practice seems to have been, both under the bankrupt law of 1800 and that of 1841, for the State courts to entertain jurisdiction of actions brought by the assignee of a bankrupt; but this jurisdiction was not seriously questioned until the case of *Ward v. Jenkins*, 10 Metc. 583. In that case it was claimed by the counsel for the defendants, that an action for a breach of a covenant made with the bankrupt could not be brought by the assignee in a State court, and that such a suit was only cognizable by the Federal courts; but the objection was overruled, the State court asserting its jurisdiction of the action. This case was subsequently followed in Massachusetts, in an action brought by an assignee under our present bankrupt law to recover money paid by the defendants to the bankrupt in good faith without knowledge of the bankruptcy, but in fact made after the publication of notice of the warrant in bankruptcy under section 11; though the objection that the courts of the United States had exclusive jurisdiction of such an action was waived at the argument. *Stephens v. Mechanics' Savings Bank*, 101 Mass. 109; see also *Forbes v. Howe*, 102 id. 428. The case of *Ward v. Jenkins* was also followed in Indiana in *Hastings v. Fowler*, 2 Cart. 216. In Kentucky, in an

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action brought by the assignee in equity for recovering property, real and personal, charged to have been fraudulently transferred by the bankrupt, the State court say they do not doubt but they have jurisdiction concurrent with the Federal courts, to decree in favor of the assignee, and that such jurisdiction had been too often exercised in that State to be an open question. *Boone v. Hall*, 7 Bush. 66. See also *Paine v. Able*, id. 344; and *Shackleford v. Collier*, 6 id. 149. In Pennsylvania, the jurisdiction of the State courts, in actions brought by the assignee to recover the property of the bankrupt, does not seem to be questioned. *Mays v. Manufacturers' National Bank*, 64 Penn. 74; 3 Am. R. 573. See *Pierce v. Evans*, 61 id. 415; *Rohrer's Appeal*, 62 id. 498. But, on the other hand, the supreme court of Michigan, in a well-considered decision recently made — of which a manuscript copy of the opinion has been furnished us by the counsel for the defendants in this case — decline to take jurisdiction of a bill in equity filed by an assignee to set aside a conveyance alleged to have been made by the bankrupt in fraud of the bankrupt law. *Voorhees, assignee, etc., v. Frisbie et al.*, 25 Mich. 476. The reasoning of the court in this case is strongly in support of the position that the State courts have no jurisdiction of actions arising under the bankrupt law, though the decision was placed upon grounds more peculiarly applicable to suits in equity. But the practical difficulties which will necessarily result if a State court at law should entertain suits brought by assignees concerning the property and debts of the bankrupt, are scarcely less grave and serious than the complications which might arise in equitable actions. In the first place, it must be obvious that the assertion of a State jurisdiction in such causes will greatly tend to protract and multiply suits in respect to the bankrupt's estate, and will inevitably be a most fruitful source of conflict and collision between the State and Federal tribunals. The object and policy of the bankrupt law manifestly are to collect and distribute the property of the bankrupt among his creditors as promptly as practicable; and these ends can be much more readily accomplished by the United States courts — which have plenary jurisdiction in these matters — than by tribunals acting by different modes, and deriving their powers from other sources. Some of the remarks made by Mr. Justice STORY, in the case of *Ex parte Christy*, 3 How. (U. S.) 292, in reference to the provisions of the bankrupt law of 1841, express my own views so well upon this subject that I cannot do better than quote them. He says:

“The obvious design of the bankrupt act of 1841, chapter 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by congress, capable of being worked out through the instrumentality of its own courts independently of all aid and assistance from any other tribunals over which it could exercise no effectual control. * * * It is further objected that if the jurisdiction of the district court is as broad and comprehensive as the terms of the act justify, according to the interpretation here insisted on, it operates, or may operate, to suspend or control all proceedings in the State courts either then pending or thereafter to be brought by any creditor or person having any adverse interest to enforce his rights or obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that, under the provisions of the 6th section of the act, the district court does possess full jurisdiction to suspend or control such proceedings in the State courts, not by acting on the courts, over which it possesses no authority, but by acting on the parties, through the instrumentality of an injunction or other remedial proceedings in equity, upon due application made by the assignee and a proper case being laid before the court requiring such interference. * * * It would be easy to put cases in which the exercise of this authority may be indispensable on the part of the district court to prevent irreparable injury, or loss or waste of the assets, without advertng to the case at bar, where, upon the allegations in the petition and supplemental petition, the creditors of the bankrupt are attempting to enforce a mortgage asserted to be illegal and invalid, and to procure a forced sale of the property by the sheriff in an illegal and irregular manner, thereby sacrificing the interest of the other creditors under the bankruptcy. * * * If we are told that resort may be had to the State courts for redress, our answer is, that in some of the States no adequate jurisdiction exists in the State courts, since they are not clothed with general jurisdiction in equity. But a stronger and more conclusive answer is, that congress did not intend to trust the working of the bankrupt system solely to the State courts of twenty-six States, which were independent of any control by the general government and were under no obligation to carry the system into effect. The judicial power of the United States is, by the constitution, competent to all such purposes; and

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congress by the act intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do." Pp. 312, 318, 319, 320. These remarks indicate clearly that, according to the judgment of this eminent judge, sound policy and a just regard to public as well as private interests require that the jurisdiction of the district and circuit courts of the United States over all cases arising under the bankrupt law should be exclusive of the State courts. And I cannot but think that congress has in fact vested in those courts this complete and exclusive jurisdiction over "all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt," including of course such jurisdiction and power as may be essential for "the collection of all the assets of the bankrupt," independently of all aid and assistance from any State tribunals, over which it could exercise no effectual control. See also *McLean, assignee, v. LaFayette Bank*, 3 McLean, 185; *Peck v. Jenness*, 7 How. (U. S.) 612.

But even if I had any doubt about this being the proper construction of the bankrupt law, I should still think it was more consistent with the dignity and independence of the State tribunals to decline to take jurisdiction of cases arising under that act — if such jurisdiction theoretically existed — rather than expose themselves to collisions and conflicts with the United States courts, or subject their proceedings to the control of those courts in attempting to adjudicate them. It must be understood, however, that I only express my own views upon this question, that the act vests in the Federal courts exclusive jurisdiction of all actions arising under the provisions of the bankrupt law so as to take from the State courts any jurisdiction in those cases; but that my brethren do not deem it necessary to express an opinion upon that question at the present time. According to their view the complaint states a cause of action under the thirty-fifth section of the bankrupt law, which is penal in its character, "in creating a forfeiture and disability enforceable in favor of the assignee" (*Voorhees v. Frisbie, supra*), and a State court will not exert its jurisdiction to enforce such a liability. I am inclined to agree with them, and to hold that the demurrer should have been sustained even upon that ground.

The first clause of the thirty-fifth section of the bankrupt law was obviously designed to defeat and render void any transfers or sales of property made by a debtor, being insolvent or in contempla-

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tion of insolvency, with a view to give a preference to a creditor. And it provides that any payment, transfer or conveyance of property made by the debtor, being in insolvent circumstances, within four months previous to filing his petition, with a view to giving a creditor such preference, shall be void if the creditor at the time has reasonable cause to believe the debtor is insolvent, and the payment or transfer was made in fraud of the act. The complaint states a cause of action under this provision, and the assignee seeks to recover the stock of goods or their value from the defendants.

It is plain that this suit is founded strictly upon the provisions of this act — would not exist independently of it — and is not, as was the case in *Ward v. Jenkins*, brought upon a contract or to recover a debt due the bankrupt. The bankrupt law condemns and avoids the sale and assignment of property stated in the complaint to have been made, because they were made with a view to give the defendants a preference. But the transaction is entirely valid by the State law. The fact that a debtor in insolvent circumstances chooses to pay one creditor in preference to another, is not a fraud under the State statute — nor is it contrary to public policy and good morals. Such a preference is only forbidden by the bankrupt law — declared to be a fraud upon its provisions and in contravention of its policy and design. But these provisions, which avoid the sale and create the forfeiture, are penal in their character, and consequently the question arises: Should the State courts exert their jurisdiction to enforce them?

The doctrine is well settled that one State will not take cognizance of nor enforce penalties imposed by the laws of another State; and the principle applies to acts of congress which create a forfeiture. The rule is clearly stated by Chief Justice SPENCER in *The United States v. Lathrop*, 17 Johns. 3, which was an action brought to recover a penalty imposed by an act of congress for selling by retail spirituous liquors without license, contrary to the provisions of the law. He says: "It cannot be doubted, that a pecuniary penalty for a violation of, or non-conformity to, an act of congress, is as much a punishment for an offense against the laws, as if a corporal penalty had been inflicted; and as regards crimes and offenses made so by legislative enactment, the government of the United States stands in the same relation to the State governments as any foreign government, and it is a fundamental maxim, that the courts of one sovereignty will not take cognizance of, nor en-

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force, the penal code of another. Thus, in the case of *Scoville v Canfield*, 14 Johns. 339, we held that we would not enforce a penal statute of Connecticut, on the broad principle, that the courts of this State will not carry into effect the penal laws of another State." P. 9. And this same rule has frequently been applied to actions brought in one State to enforce a liability imposed by statute upon the officers of a corporation created by another State, for some violation of duty. Such liability is considered to be in the nature of a penalty created by statute, which the courts of another State will not enforce. *First National Bank, etc., v. Price et al.*, 33 Md. 488; *Derrickson v. Smith*, 3 Dutch. (27 N. J. Law) 166; *Halsey v. McLean*, 12 Allen, 438. In these cases, and others which might be cited to the same purport, the courts say that the liability imposed upon the officers of the corporation for a failure to perform a duty enjoined by the statute, is in the nature of a penalty; that the law imposing the liability can have no extra-territorial operation; and that there is no usage or rule of comity which requires the courts of another State to enforce such liability. We cannot see why the same principle should not be applied to the provisions of the bankrupt law before us. For, as already remarked, the subject-matter of this suit does not exist independent of these provisions which are penal in their nature. *The Harrisburg Bank v. The Commonwealth*, 26 Penn. St. 451. They avoid a transfer and assignment of property valid by the law of the State and binding on the debtor himself. They destroy a title because the assignment or conveyance was made with a view to give a preference to a creditor. If a statute which enjoins a duty to be performed by the officers of a corporation, and, in case of failure on their part to perform such duty, makes them individually liable for the debts of the corporation, is penal in its nature—as held by the cases above cited—and can only be enforced in the State enacting the law, there are surely strong grounds for saying that the provisions of the bankrupt law which forfeit and destroy a title acquired under the circumstances stated in the complaint, are highly penal in character, and are to be governed by the rules and principles applicable to such statutes. And as this action is brought to enforce, through the instrumentality of the courts of this State, these penal provisions, the action must fail. For the entire right of action grows out of these provisions, and depends wholly upon them.

In the case in Michigan above referred to, the supreme court of

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that State take the same view of these provisions. They say: "The right to assail the conveyance in question is purely statutory upon the case made by the bill. It is also in the nature of a penal enactment, in creating a forfeiture and disability enforceable in favor of the assignee. It is generally understood to be settled law, that no court will take jurisdiction for the sole purpose of enforcing the penal consequences imposed by any other authority, which has its own courts to enforce them."

It is suggested that the bankrupt act is the supreme law of the land, binding upon all courts; and that its provisions address themselves with the same compelling obligation to the State as to the Federal tribunals. In a certain sense this is undoubtedly true. This court would be bound to respect and sustain titles derived through the bankrupt proceedings. This is clear. But its duty and power to take jurisdiction of causes arising under the bankrupt law are quite different matters.

It results from these views that the demurrer to the complaint should have been sustained.

The order overruling the demurrer is reversed, and the cause remanded with directions to dismiss the complaint.

CONKEY v. MILWAUKEE & ST. PAUL RAILWAY Co., appellant.

(31 Wis. 619.)

Common carriers — connecting lines — liability for goods lost.

Plaintiff was the consignee of goods delivered to defendants, common carriers, to be by them transported to the end of their line, and there delivered to a connecting line for transportation to the place of destination. The defendants transported the goods to the end of their line, and placed them in that portion of their warehouse appropriated to goods intended for the connecting line, and from which such line was in the habit of taking goods without any notice or request. Before the removal of the goods by the connecting line, they were destroyed by fire. *Held*, that the liability of the defendants, as common carriers, continued until the goods were actually taken into possession by the connecting line, and that plaintiff could recover. *Wood v. The Milwaukee, etc., Railway Co.*, 27 Wis. 541 (9 Am. Rep. 465), overruled on this point. (See note, p. 643.)

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ACTION to recover the value of goods lost while in the alleged possession of the defendants, as common carriers. The goods were delivered at Milwaukee on the 11th, 12th and 13th of May, 1870, to the defendants, directed to the plaintiff, as consignee, at Lanesboro, Minnesota, and to be transported by defendants to La Crosse, and thence by the Southern Minnesota Railroad Company to Lanesboro. The receipts given for the goods by defendant were in the following form :

“Received, Milwaukee, May 11, 1870, from X., in apparent good order, to be delivered in like order, the following property, marked ‘Conkey Bros., Preston, Minn., R. R., Lanesboro,’” etc.

The defendants carried the goods to La Crosse, and there put them into that portion of their warehouse set aside for freight intended for the Southern Minnesota Railroad Company, and from which the latter was in the habit of taking goods without any notice or request. On the 14th of May the said warehouse was destroyed by fire, and also the goods of the plaintiff, then in it, ready for the Southern Minnesota Railroad Company.

The only evidence of a thorough contract was that contained in the foregoing receipts.

The general freight agent of the defendants testified as follows: “That defendants’ road extended from Milwaukee to La Crosse, and there ended; that defendant gave no rates of freight on the Southern Minnesota railroad; that it delivered freight to that railroad at La Crosse, charging that company at the time with its own charges, and back charges, if any; that the Southern Minnesota company delivered freight to defendant in the same way at La Crosse; that the agents of the companies settled the accounts, from time to time, as suited their convenience; but that neither company had any thing to do with freight, or the collection of charges thereon, after it had passed into the hands of the other company, but looked to the company alone for their own back charges.”

The court instructed the jury that defendants’ liability continued until they had delivered the goods to the Southern Minnesota railroad, or until that company had been notified of their arrival and readiness for delivery, or had refused to receive them, or had had reasonable time to remove them; that a “reasonable time” meant such time, after the goods were ready for delivery, and after notice, as would enable the Southern Minnesota railroad, in the usual course

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of business, to examine the goods to see if they were in proper condition, and to take them away; and that if it was the usual course of business between the defendants and the Southern Minnesota railroad for the latter to call on the defendants once a day for freight, and it did so call on the day of the fire, and the goods were not there ready for delivery, the defendants were liable.

The court refused to instruct, in behalf of the defendants, in effect that if the defendant had transported the goods to La Crosse, and had, according to the usual course of business, placed the goods ready for delivery in that portion of its warehouse from which the Southern Minnesota Railroad Company was in the habit of taking goods without notice or request, then the defendants were not liable.

Verdict and judgment for plaintiff; and defendants appealed.

John W. Cary, for appellant.

Jenkins & Elliott, for respondent.

DIXON, C. J. The learned counsel for the railway company asked permission at the bar, and the request was also joined in by counsel for the plaintiff, and leave was granted by the court, to re-argue the point decided in *Wood v. Railway Co.*, 27 Wis. 541 (9 Am. Rep. 465), that where a common carrier conveys goods over only a portion of the route between the places of shipment and consignment, and holds them for delivery to some connecting carrier, the liability of the former as a common carrier continues until the goods are ready for delivery to the connecting carrier, and until the latter has had a reasonable time to take them away. The "reasonable time," as there defined, was said to be the earliest practicable time after the first carrier is ready to deliver, and is not measured by any peculiar circumstances in the condition of the second carrier requiring for its convenience that it should have a longer time.

Against the rule thus laid down, counsel on both sides in this case, as well as in some others involving the same question, most earnestly and vehemently protest, on account of the great uncertainty which must exist in its application to particular cases, and the likelihood of most tedious and expensive litigation which may follow in determining the rights of the owner of the goods, or the liability of the carrier, in almost every such case of loss. Counsel

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say, and say truly, that the inquiries of the fact upon which the issue is made to depend, are of the most equivocal, perplexing and doubtful character, such as the parties will seldom agree upon, and such as will often divide the jury. They say that the expression, "reasonable time," is suggestive of the most embarrassing vagueness and uncertainty, opening wide the door to speculation and diversity of opinion in many cases; and that where one jury may say "yes," another, upon the very same state of facts, may answer "no," while a third may fail to agree altogether. Counsel cry out against this uncertainty, these doubts and embarrassments, and pray that whatever rule may be established, it may be a certain one, freed from these difficulties, and plain and easy of application. It is equally argued on both sides that the rule contended against is a departure from the true principles or policy of the law in such cases.

For the railway company, the position assumed is that its liability as carrier should cease whenever the goods are removed from its cars, and thenceforth it should be responsible to the owner for the property in its possession only in the character or capacity of a warehouseman or a depositary for hire. This is the rule in some of the States, and it has the advantage of that convenience and certainty of application for which counsel contend.

On the other hand, the position taken by counsel for the plaintiff is, that the removal and deposit of the goods in the warehouse, preparatory to a delivery of them to the next carrier, and for that purpose, is a part, and a necessary and indispensable part, according to the method of transportation and conveyance adopted and in use by railway companies and some other carriers, of the act of carriage itself; and that the liability of the last carrier as such does not, under ordinary circumstances, cease until the goods have been actually delivered to, or placed in the custody and control or under the management and direction of the next carrier, so that the liability of a common carrier will have attached to the latter in case of the loss or destruction of the goods from any cause not exempting a common carrier from responsibility. The position assumed in this behalf is, that the warehousing, so called, of goods thus in transit over different connecting routes, and which have not reached their place of destination or ultimate delivery, is merely incidental and subsidiary to the principal or main act of carriage, and a part of that act. With respect to goods and property so on the way or going forward, the position, except under extraordinary

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or peculiar circumstances, recognizes no such thing as an interruption of a common carrier's liability, or of the protection afforded by that principle of the common law, so far as it respects the rights and remedies of the shipper or owner of the goods. The position rejects entirely the doctrine, as to goods thus in the ordinary course of transit, that the common carrier in whose possession they are, may be now a common carrier and now only a warehouseman, according as the goods may be in motion in the cars or other vehicles, or at rest upon a platform or in a depot or other place of temporary deposit. It ignores entirely the assumption that, as to such goods and under such circumstances, the carrier can become a mere warehouseman, and liable only in that capacity to the shipper or owner, but declares that as to him the character or capacity of common carrier remains unchanged with the possession of the goods, and until the same has been parted with by delivery to the next carrier. It regards depots and other buildings erected by the carrier, in which goods passing over the route are thus temporarily housed and protected from loss or damage by the elements, as well as from the depredations of thieves and trespassers, as structures for convenience merely of the carrier himself, or not only convenient but essential to his business as a carrier during these pauses or rests made necessary by the system or mode of transportation which now almost universally prevails. It looks upon the warehouses and other buildings and places for storage merely as concomitants of the carrying business, ancillary and subservient thereto, but not as giving the carrier any distinct or separate character or business with respect to the goods *so en route* and in his possession and custody. It holds the warehouses of railway companies as structures designed to facilitate their business as carriers, by enabling the companies to carry out a system of separation, classification and delivery of goods received and carried, without which there would be no possibility of conducting their carrying business with the requisite precision and dispatch, or with any ease or profit.

Such are some of the views, briefly expressed and in my own language, which were urged by the learned counsel for the plaintiff, and such is the rule they would have the court sanction and adopt as the true and sound one in the law. It will be seen, too, that this rule has the same advantage of certainty, and of convenience and clearness of application as that propounded and urged by counsel for the railway company.

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I must say that I was very forcibly impressed by the arguments on both sides made at the bar, and such was the interest awakened in my mind that I at once gave the question an attentive and thorough examination, as much so, at least, as my time and capacity and the means at hand would permit. I came to the conclusion with counsel on both sides, that the rule of *Wood v. The Railway Company* could not and ought not to stand, and that, as is most apt to be the case with middle grounds, often of doubtful policy and more often of dangerous tendency to sound principle, it failed in that clearness, certainty and convenience of application which the true principles of law require, and which are indispensable to the facility, safety and confidence of business transactions and of all commercial dealings and traffic constantly taking place over these great connecting routes of trade and communication. I became satisfied that, however, in the various and multiplied turns and complications of human affairs and relations, doubts and uncertainties inhere in and are inseparable from some legal rules, this was a case where they ought not to exist. The rule here, whatever it is, should be definite and certain in its application to all ordinary cases. There is no inherent difficulty in making it so, and the immense interests of the carrying business of the country, as well as of trade and commerce, peremptorily demand it. In the multitude and importance of cases so frequently arising, and which must ever thus continue, parties cannot be delayed to palter and trifle, as it were, in a delusive struggle for their rights over nice distinctions of fact and fine shades of difference, which fade away into regions of obscurity and finally of total darkness, and which facts, when settled, settle nothing after all but the particular case, leaving all others to be contested and litigated over and over again upon the very same grounds. I agree, therefore, with counsel on both sides, when they say that the expenses attending this course of decision, or the litigation which must follow, would be enormous, and that this alone, without considering the other inconveniences and mischiefs to which allusion has been made, is sufficient to condemn the rule. I agree that any rule unnecessarily fraught with such evil consequences is a bad one, and should be abandoned.

This is another of the numerous actions springing from the same unfortunate destruction of property as in *Wood v. The Railway Company*. The question comes up, therefore, which of the two rules propounded by counsel is the correct one and ought to be adopted.

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For I conceive that I must in this case act upon and determine the rights and liabilities of the parties according to one or the other. In *Wood v. The Railway Company*, I assented to the rule laid down, not because I thought there was or could be, under ordinary circumstances, a pause or cessation in the common carrier liability with respect to the consignee or owner of the goods, during such temporary rest and storage of them preparatory to delivery to the next carrier, and during which also there would spring up and exist only a warehouseman's or forwarder's liability; but I did so on the supposition that the carrier's liability was to be continuous until the goods reached their place of final destination, where they were to be delivered to the consignee or owner. My supposition and view was, that the liability of the next carrier in the connecting line or route, as a carrier, would attach the very moment that of the last carrier, as such, would cease. In other words, I considered that whenever the liability of the last carrier, as such, ceased by lapse of reasonable time for the next carrier to receive and carry forward the goods according to the usual course of transportation and business after the goods were ready for delivery to him, the liability of the latter as a carrier attached, and he must be held to respond to the consignee or owner for their value in case of the subsequent loss or destruction of them. Such was my consideration of the question, and I placed it, not upon the ground that the next carrier had become or was in any sense the agent of the consignee, owner or shipper of the goods, and in that character responsible to him for not receiving and carrying them forward, but upon the ground of the usage and custom among carriers so related to and connected with each other in the business of transportation that their lines, or routes, though separately owned and managed, yet running into and uniting one with another, in practical operation and effect constitute one continuous route. The usage among carriers so connected, or joining their routes, in the absence of special contract or special notice to the contrary, is not only well known in commercial and business circles, but is also known and acted upon by the courts. Courts recognize and give force and effect to it. *Schneider v. Evans*, 25 Wis. 241 (3 Am. R. 56), and cases there cited. That usage, now become universal or very nearly so, is for the railway company, receiving the goods destined for a place beyond the terminus of its route, to transport them over its own road and then deliver them to the next company or carrier in the line of transit, collecting from the latter its own

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charges for freight and transportation, whereupon the latter becomes invested with a lien upon the goods for the charges so advanced in addition to his rates or charges for the transportation and delivery to the next succeeding carrier, who, in turn, advances the charges of the two that have preceded him, and thus the process continues and is repeated until the goods have reached their place of destination and are in the hands of the last carrier, ready for delivery to the consignee or owner, subject to payment to such carrier of the accumulated charges of all the preceding carriers over whose routes they have been transported.

Now it was upon this well-known custom and usage, amounting as it does to an implied contract or promise on the part of each succeeding carrier to pay back charges and receive and carry forward the goods brought to it by the preceding one, that I relied as constituting the true ground of action or liability against the succeeding carrier, in case he unreasonably failed to receive and carry forward the goods according to his implied contract or obligation, and as he had held himself out as ready and willing and promised to do. That contract or obligation, I then thought and still think, created a liability on his part co-extensive with and similar in nature to his liability as a common carrier, in case he neglected or refused, in proper time and according to the usual course of business, to receive the goods, and they were afterward, and before coming to his possession, lost or destroyed. I then looked upon his liability, and still do, as being in extent the same as if the loss or destruction had been of the goods in his custody and possession as a common carrier. It was to my mind like the case of goods delivered to a carrier for transportation, and which were destroyed before the transit commenced. By the law of common carriers, their liability is fixed on receipt of the goods, and if they are lost in the warehouse of the carrier or elsewhere before the carriage commences, the carrier must respond, unless the loss was caused by a force superior to and beyond human agency and foresight, or by the public enemy, the *onus* of showing which is upon the carrier. *Blossom v. Griffin*, 13 N. Y. 569; *Ladue v. Griffith*, 25 id. 364. I regarded the goods, when separated and set apart in the accustomed place in the warehouse, and ready for delivery by the preceding carrier, and after a reasonable time had elapsed for the succeeding one to receive them, and when, in the due course of business, he should have done so, as being *pro hac vice*, if need be, in the ware-

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house of the latter awaiting transportation by him, or if necessary for the purpose of the remedy, constructively in his possession as a common carrier.

Such were the views which I then entertained, and I have as yet discovered no good reason for changing them. I then thought, and still think, that the loss, if possible, should be made to fall on the carrier in fault, or him who appeared most so, and it was for this reason I assented to the rule that the last carrier should be held responsible, as such, only until a reasonable time had elapsed for the next carrier to receive the goods, and not after that time. I was not disposed to make the last carrier responsible, without remedy, for the faults and delinquencies of the next, over whose movements and conduct he had no control. It was upon this principle I yielded assent to the rule, and it did not occur to me then that there was any better or more satisfactory solution of the difficulty.

It will be seen, hence, that I did not assent to the rule on the ground that the next carrier was the agent of the owner for the purpose of receiving such delivery, which seems quite impossible. The agency, in such cases, springs from the possession of the goods in the hands of a carrier, marked for some place beyond the terminus of its own route. Such carrier, from the fact of possession, becomes the agent of the owner for the purpose of making or tendering delivery of the goods to the next in the proper line of transit. By the usage of the business in which he is engaged, he assumes to do that when he receives the goods, and it may properly enough be said to constitute a part of his undertaking as carrier. The decision in *Schneider v. Evans* means just this and nothing more, and Mr. Justice LYON himself now concedes the error in the application. Had particular attention been directed to it at the time, it would undoubtedly have been corrected.

But the difficulties in the way of applying the rule are manifest and manifold. It casts upon the owner of the goods the burden and the risks of settling the rights and liabilities as between the different carriers. It imposes upon him a task which in nearly every case he will have no adequate or proper means of performing. He is often a stranger, residing in a distant part of the country, and wholly unacquainted with the facts. Actual knowledge of the facts and of the particular system or mode of transacting the business, rests only with the agents and employees of the carriers; and

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being adversely interested, it is not to be expected they will be free to communicate what they may know. Indeed, it must be presumed that they will refuse to give information of facts which will charge their employers, if they know such facts.

And a result of the rule may be to deprive the owner of all remedy for the loss or destruction of his property, after he has mulcted himself in two heavy bills of costs. He may come out like Mr. Bromley with his portmanteau, with no right of action against either carrier. *Midland Railway Co. v. Bromley*, 8 J. Scott, 372 [84 E. C. L. 372, 382, note (a)]. A verdict and judgment in an action against the last carrier settles nothing in a suit against the next. In an action against the last the jury may find that a reasonable time had elapsed, and in the suit against the next they may find the reverse; and so the owner falls between two fires.

And again the question arises, What is the proper way out of these difficulties? I have examined not only the cases cited but very many others, and have pondered the question well, at least as well as I am capable of doing, as between the two rules laid down by counsel, neither of which is unsupported by authority; and my conclusion is, that the rule contended for by counsel for the plaintiff is the correct and true one. In coming to this conclusion I have anxiously endeavored to recognize a rule, which, while it shall not prove injurious and embarrassing to the great commercial interests of the country, shall, at the same time, protect the interests of the carriers, or, at all events, be of so much aid and service to them that the proprietors of that interest shall know and understand with clearness and certainty the full extent of their obligations to the public.

I think, in the absence of special contract or agreement to the contrary, the true policy of the law, now as much as ever and even more, is to adhere to the strict rules of liability on the part of common carriers established by the common law. I believe the safety and protection of the trade and commerce of the country demand this, and I believe also that, by the feeling of confidence and security thus created and given, the great carrying interests of the country will be likewise ultimately benefited, and their prosperity promoted. I believe the true policy of the law consists with giving the owner a certain, sure and ample remedy in case of the loss or destruction of his goods while in the hands of the carrier; and hence I reject the rule contended for by counsel for the railway com-

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pany, because it is calculated to give the owner any thing but such remedy. To admit the change in capacity and liability from carrier to warehouseman at every pause in the carriage over our long connected routes, would in practice and effect be to say to the owner that he has no remedy. To recover as against a warehouseman, the burden would be upon the owner to establish the negligence. He must aver and prove that his goods were negligently lost or destroyed, which, except in very rare instances, would be an utter impossibility, even though the fact of negligence might exist. It would be better far to inform him that he is without relief, than to deceive him with a remedy like this.

To admit such interruptions of the liability of the carrier would make clear the way for the grossest frauds and impositions, with no means of protection and no power of discovery on the part of the owner. He is always absent. He does not go with his goods, and cannot be permitted to do so. He must trust them absolutely and exclusively to the keeping of the carrier. Whether they were lost or destroyed when in motion or on the way, or while in a warehouse, he could not tell, and it would generally be a secret past his finding out. He would be wholly in the power and at the mercy of the carrier; and if the carrier said they were destroyed in a burning warehouse or depot, he must abandon all claim. This would be placing too great power in the hands, as well as too great temptations in the way of carriers.

"It is well settled in this State," says Mr. Commissioner EARL, in delivering the opinion of the commission of appeals in *Fenner v. Railroad Co.*, 44 N. Y. 505 (4 Am. R. 710), "that an intermediate carrier, one who receives goods to be transported over his route, and thence by other carriers to their place of destination, generally remains liable as a common carrier until he has delivered the goods to the next carrier. It was deemed wise policy that the principles of the common law should be so expounded and applied, that the liability of one carrier should continue until that of the next carrier commenced." The learned commissioner cites *Miller v. Steam Navigation Co.*, 10 N. Y. 431; *Gould v. Chapin*, 20 id. 266; *Ladue v. Triffith*, 25 id. 364; and *McDonald v. Western Railroad Corporation*, 34 id. 497; and then proceeds with a quotation of the language of Chief Judge JOHNSON in *Gould v. Chapin*, as follows: "No owner can be supposed to have an agent to superintend each transshipment of his goods, in the course of a long line of transpor-

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tation; and if the responsibility of each carrier is not continued until delivery in fact to the next carrier, or at least until the first carrier, by some act clearly indicating his purpose, terminates his relation as carrier, we shall greatly diminish the security and convenience of those whose property is necessarily abandoned to others, with no safeguards save those which the rules of law afford."

And next the commissioner quotes the language of Judge SMITH in *McDonald v. The Western Railroad Corporation*, which is this: "The owner loses sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination. At each successive point of transfer from one carrier to another, they are liable to be placed in warehouses, there, perhaps, to be delayed by the accumulation of freight or other causes, and exposed to loss by fire or theft, without fault on the part of the carrier or his agents. Superadded to these risks, are the dangers of loss by collision, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing under such circumstances should be held to be a mere accessory to the transportation, and the goods should be under the protection of the rule which makes the carrier liable as an insurer, from the time the owner transfers their possession to the first carrier till they are delivered at the end of the route."

And here it occurs to me to observe, that among the great number of such cases which have arisen and been adjudicated by the courts of New York, not one has yet been presented where the intermediate carrier has been exonerated from liability as a carrier for goods lost or destroyed while in store or on deposit by such carrier. The case of *Mills v. Railroad Co.*, 45 N. Y. 622 (6 Am. R. 152), cited by counsel for the plaintiff in this action, would seem to have been a pretty strong one for declaring an exception, but yet the court refused. The case of an *adjudicated* exception is yet to come, for thus far the doctrine rests upon mere suggestions or hints, vaguely thrown out, and nothing more.

And the case of *Nashua Lock Co. v. Railroad Co.*, 48 N. H. 339 (2 Am. R. 242), is a most elaborate and powerfully reasoned one, many of the arguments and views of which very strongly favor my conclusion. It contains a review and examination of most of the leading authorities, English and American, and a statement of the

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doctrines of the courts on both sides of the Atlantic. I must say that I think Mr. Chief Justice PERLEY performed a very great and valuable service, both for the profession and for the law, when he wrote that opinion.

And the case of *Barter v. Wheeler*, 49 N. H. 9 (6 Am. R. 434), is another case most elaborately and well considered, as is the manner of that court, which also favors my views. I need only refer to these last two cases for a full and ample vindication of the principles by which I think the present ought to be governed.

In England, the question presented in this case has never, to my knowledge, been considered, since, under the rule in *Muschamp's Case*, 8 M. & W. 421, it could not well arise. The first carrier there is liable, as such, for the safety of the goods throughout the transit and until they are delivered at the place of destination, which is, of course, a sufficient protection of the rights of the owner or consignee. The English rule has also, I believe, been applied in Illinois.

Now, in the present case, I think the law should hold the carrier in whose possession the goods were destroyed, responsible to the owner or consignee for their value, as a carrier or insurer of the goods, leaving such carrier to seek his remedy against the next carrier in the route or line of transit, in case it was the fault of the latter that the goods were not removed in due time as regulated by the course of business and the usage and practice prevailing among carriers. In this way the burden of settling those hazardous and uncertain questions would be thrown upon the carriers themselves, where it belongs. They are the parties who know the facts, or have ample means of ascertaining what they are. In this way, also, multiplicity of actions would be saved, for, as between the carriers themselves, the controversy could be settled in one action. I have no doubt that upon the usage and custom above spoken of, or upon the implied contract or obligation growing out of it, one carrier may maintain his action against another under such circumstances.

As I have limited the rule which I regard as the true one, to ordinary cases, or those arising under ordinary circumstances, it may be proper, perhaps, that I should suggest what would seem to me to be an extraordinary one. I should say that in a case of a break or interruption in the line of transit or communication, as by storm, flood or earthquake, or by fact of war, rendering it impossible to send the goods forward, or making considerable delay in the

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transportation necessary, the carrier might store the goods and at once give notice to the consignee or owner, and thus absolve himself from liability as a carrier. Other cases of an extraordinary nature might also occur. I only suggest these.

I think the judgment should be affirmed.

COLE, J. I concur with the chief justice in the rule of law which gives the owner or consignee the continuous liability of a common carrier while the goods are in transit, and, in case of loss, gives him his action against the carrier having possession when the loss occurs; and therefore I think that the judgment must be affirmed.

LYON, J. I concur in the affirmance of the judgment of the circuit court, but am inclined to adhere to the doctrine asserted in the case of *Wood v. The Mil. & St. P. R. R. Co.*, 27 Wis. 541.

Judgment affirmed.

NOTE.—See note to *Mobile, etc., R. R. Co. v. Pettit*, 7 Am. Rep. 591.—RHP.

MCARTHUR v. SCHENCK, appellant.

(31 Wis. 673.)

Usury — payment by third person.

A borrower who has not agreed to pay usurious interest cannot maintain the defense of usury to an action to recover the money loaned, on the ground that a third person has paid the usury demanded by the lender for making the loan.

THIS was an action to foreclose a mortgage for \$2,500 executed by the defendants, Schenck and wife, to secure notes for that amount made by said Schenck, payable to plaintiff's order. The opinion states the case.

Judgment was rendered in the circuit court for the plaintiff, and the defendants appealed.

Williams & Sale, and I. C. Sloan, for appellants.

Cassody & Merrill, for respondent.

DIXON, C. J. It is a concession fairly due to the evidence, we think, that there was reserved and taken by the plaintiff upon the

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loan for which the notes and mortgages in suit were given, the sum of \$30 usury. Such usury was received by the plaintiff, or paid to him, by being deducted from the sum agreed to be loaned, making the sum actually loaned \$2,470, instead of \$2,500 as represented by the notes and mortgage. Such deduction was exacted by the plaintiff at the time of the loan.

It is likewise a concession equally due to the evidence, as we understand it, that the \$30 usury so exacted and taken was not in fact paid, or the loss thereof suffered or borne, by the defendant Schenck, the husband, who made the notes and mortgage and appeared in the transaction as the borrower of the money. The \$30 was actually paid, or the loss from the usurious exaction in realty sustained, by Belden, from whom Schenck purchased the farm, a portion of the price of which constituted a part of the consideration for which the notes and mortgage were executed. Belden deducted the \$30 from the price which Schenck had agreed and was willing to pay him for the farm. This fact we think quite clearly established by the evidence, and especially the testimony of Schenck himself.

The question involved, therefore, is very clearly and correctly presented by the following case supposed by the learned counsel for the defendants: "Suppose A proposes to buy a farm of B, for which B asks \$2,500 cash. A will buy it if he can borrow the money to pay for it, and applies to C for that purpose. C says, 'I will loan you the money if you will pay me \$30 in excess of lawful interest.' A informs B that he would like to buy his farm, but is unwilling to stand the \$30 shave. B says, 'I will stand it.' On this consideration A borrows of C \$2,470, and secures by his note and mortgage the payment of \$2,500. C attempts to foreclose the mortgage, and A sets up the usury. Is it any answer on the part of C, that in fact B and not A lost the \$30?"

If, in addition to the facts thus supposed by counsel, we suppose the still further or different facts, that B, the seller of the farm, is acting as agent for C, the lender of the money, in negotiating the loan, and, knowing the unlawful exaction and that A is unwilling to submit to it, submits to and incurs the loss himself by a corresponding deduction from the price of the farm, rather than not make sale of it, we shall have a case more exactly fitting the circumstances of the present one, and illustrating the true attitude and relations of the parties to the transactions.

The question to be resolved, therefore, is that above put by coun-

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sel. Will the fact that the usury was in truth paid by B, and not by A, prevent A from setting it up in defense, and avoiding the note and mortgage on account of it?

Suppose A, being indebted and desirous of borrowing money, applies to C for a loan, and C refuses, saying he is unwilling to loan his money at the rate of interest allowed by law, but that he will do so if B, a stranger to the loan, will give him, C, so much money, equaling the amount of usury which he demands; and B thereupon voluntarily gives him the amount required, and he then makes the loan to A at lawful interest; is such a transaction usurious and void as to A, the borrower?

Again, in the case like that put by counsel, let it be supposed that B, instead of saying to A that he, B, will stand the loss, goes himself to C, and advances or pays the usury demanded, whereupon C lends the money to A, at a lawful rate of interest, would such a contract be usurious as between C and A?

We regard the foregoing only as a different hypothesis presenting the same question.

The theory upon which laws against usury have been enacted, and the principle which has governed in their interpretation, have always been, that the borrower was at the mercy of the lender and subject to his utmost exactions and avaricious demands, unless protected by laws. In theory, the borrower has been put, by such laws, in the same category with persons under legal disability to contract, such as infants, *femes covert*, and persons *non compos mentis*. He has been declared legally incompetent to make a bargain about money where more than the lawful rate of interest was demanded. The prohibition of all such laws, and of our law, has been and is against the lender's bargaining for, reserving or taking usury *from the borrower*. We say "from the borrower," not because the statute uses these exact words or in terms so enacts the prohibition, but because such is the evident intent and purpose of the statute. Acts of the kind have always been so interpreted and understood. It is to shield from the grasp of the lender, and save the borrower from the injurious consequences of his own weakness and inability, that such statutes have been passed. They are designed for the protection of the borrower, and the protection so given has been extended to those persons standing in his place or representing him and succeeding to his rights, such as heirs at law, executors, devisees, sureties, assignees and the like. They are designed for the borrower's

protection and benefit, and the protection and benefit of those thus representing him, *when he or they has or have suffered loss or injury from the unlawful exactions of the lender, or may suffer such loss or injury from the performance of the usurious contract, and when likewise he or they see fit not to waive the sanction or penalty of the statute in his favor.* For upon this subject of waiver it has always been a well-understood rule, that the borrower may *afterward* waive the forfeiture or penalty and ratify the transaction, if he deliberately refuses to do so. After the loan had been made, and he is not under the necessity of borrowing or of forbearance, and when the remedy of the statute is fully in his own hands and within his control, he is considered legally competent to waive it; and upon this point the rules of the courts have been very severe and stringent, and that he must exercise his privilege with the utmost promptness and diligence, or otherwise no relief will be afforded.

A recurrence to these general principles, which are well understood and elementary, seems very clearly to indicate that the payment of usury, if it be properly so called, not by the borrower, but by a *stranger* to the contract, one not connected with the loan nor liable for it, who voluntarily or from any motive advances the sum exacted or sustains the loss where the borrower is unwilling or declines so to do, is not a circumstance of which the borrower can be permitted to take advantage for the purpose of having the contract declared inoperative and void for usury. It seems not to be a case in any manner falling within the true spirit and intent of the law against usury. That law, as we have seen, is intended for the benefit and protection of the borrower who is himself obliged to submit to and suffer by the exactions of the usurer, and not for the benefit or protection of strangers, or those not borrowers, or standing in that relation to the lender. The rule is, that the plea or objection of usury is personal to the borrower or those representing him, a privilege peculiar to him or them, because he or they have or might have sustained injury by reason of the usurious contract; but that no stranger can be permitted to take advantage of or set up the objection. The reason why the stranger cannot plead it is, that he has lost nothing by it. If A purchase a farm of B subject to a usurious mortgage to C, agreeing to pay such mortgage as part of the price of the farm, or for other valuable consideration, A cannot plead the usury or avoid payment of the mortgage on that ground. Why? Because in that case A has lost nothing by the

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usury, and is a stranger to the contract, and because B, as he lawfully might do, has waived the objection and ratified the agreement. The learned counsel might argue in that case, as he has done in this, that there was the usurious agreement, and there the usury, and that the statute declares the security void; but, within all the adjudications upon the point, such argument could not prevail.

And it seems to us that the same or a similar reason must be valid against the objection of the defendants in the present case. So far as the usury is concerned, they were strangers to it. They did not pay it, and lost nothing, and can lose nothing by it. The contract entered into between them and the plaintiff, the notes and mortgage executed, were, so far as their pecuniary interests were and are involved, entirely lawful and free from any usurious taint or corruption.

And, upon looking into the authority of particular cases, more or less closely resembling the present, we find the views above expressed to have been very generally, and, so far as we know, universally sustained.

In *Little v. White*, 8 N. H. 276, it was decided that an administrator who had given his promissory note for a sum due from his intestate, and including certain unlawful interest which the intestate had agreed to pay, could not, in a suit upon the note, sustain a plea of usury on account of the unlawful interest so agreed to be paid by the intestate, and included in it. The ground of the decision was, that the administrator had in fact or presumptively long before been allowed the full sum for which his own note was given, as a payment made by him on account of the estate. "He stands, therefore," said the court, "in a similar situation to that of one who has given his note for usury *contracted to be paid by another*, having received a full consideration for the note so given, and this furnishes no ground on which to sustain a defense." And the court further proceeded: "The defendant is not attempting to set up a defense for the benefit of the estate which he represented, but is asking to avail himself of the payment of usury upon a contract *made by another*, for the purpose of obtaining a deduction upon a security *made by himself*. This he cannot be permitted to do. Had the amount which he allowed to the creditor as usury been disallowed on the settlement of his administration account, he might have shown that fact in evidence in avoidance of so much of the note he gave, on the ground of a want or failure of consideration. But it

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he has received the full amount for which he gave his note, in the settlement of his administration, he is no more entitled to avail himself of the usury which has been received, than he would be in any other case *where the creditor had received usury of a third person*. In such a case it is usury paid by the estate of the intestate, and not by the defendant." It is difficult to perceive how that case and the case at bar are to be distinguished on principle.

And again, in *Bearce v. Barstow*, 9 Mass. 45, the facts were as follows: A owing B a sum of money for a valuable consideration, and B owing C a sum on which he had received usurious interest, an agreement was entered into that A should give to C a promissory note for the sum due from B to C, including the usurious interest, and A was discharged of so much of his debt to B. In an action by C against A upon the note so given, it was held that the note was not void by the statute against usury, the verdict of the jury having negatived any contrivance to evade the statute. The argument by counsel there was like that which has been very ingeniously and forcibly presented here. Counsel said: "This was a contract made for the payment of money lent, whereby there was reserved or taken above the rate of interest allowed by the statute. And as it is within the words, so it is within the reason of the statute. If this action is maintained, the statute may always be avoided by procuring a third person to give a note instead of the borrower. The statute was intended to operate on the lender, and not on the borrower. And it will be noticed that the original lender was the present plaintiff." But the court overruled the objection, and in reply said: "The English statutes against usury contain a similar clause for the avoidance of usurious contracts, expressed in nearly the same terms, and entirely of the same import, as the clause in our own statute relied on for the defendant. The construction there is, as appears by numerous decisions, that the objection of usury, to avoid a contract, must be made to the security or promise whereupon or whereby illegal interest has been taken or reserved, and by a party otherwise liable therein." And the court, after observing that a renewal of the contract between the same parties, and every species of contrivance in the modification of any loan or contract for the purpose of evading the statute, being cases within the mischief, are also within the remedy, furthermore said, that "where the party liable upon a usurious contract will not avail himself of the remedy provided by the statute for the purpose of

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avoiding it; where he voluntarily discharges it, or suffers a judgment to be recovered upon it, or makes it the consideration of a contract entirely new, as being with *a third person not a party to the original contract*, or to the usury paid or reserved upon it, or as combining *other parties and considerations*, and not being a contrivance to evade the statute; there the provision no longer applies."

And among the English decisions cited by the court was that of Lord KENYON, in *Turner v. Hulme*, 4 Esp. N. P. C. 11, which was very pertinent to the question under consideration. There the payee of a note given for a usurious consideration had arrested the maker, and, to procure his discharge from arrest, a third person joined the maker of the note in another note for the amount of the debt; and the chief justice said "he was clearly of opinion that the consideration of the first note could not be questioned in an action on the second, unless it could be shown that it was a colorable shift to evade the statute, devised when the money was originally lent and the first note granted." And see, also, *Cuthbert v. Haley*, 8 Durnford & East, 390; Comyn on the Law of Usury, 186; *Bridge v. Hubbard*, 15 Mass. 100, 105.

And in a late case in the court of appeals of Virginia — *Drake's Ex'r v. Chandler*, 18 Gratt. 909 — the point decided is correctly stated in the reporter's note in these words: "A., B. and G. execute a bond for one thousand dollars to P. for a loan of money at usurious interest. Subsequently O., J. and W., with B., who signs himself security, execute their bond to P. for the amount, principal and interest, of the first bond, and another small bond of A., in lieu of these bonds. The usury is purged by the change of the parties, and the last bond executed is valid." The opinion is valuable as showing that *strangers* to the usury cannot take advantage of it, and it also refers to and examines several cases not above cited.

For these reasons, this court is of the opinion that the judgment appealed from was correct, and must be affirmed.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

WYCKOFF v. THE QUEENS COUNTY FERRY Co., appellant.

(52 N. Y. 32.)

Ferryman. Negligence — contributory negligence.

Ferryman do not assume all the responsibility of common carriers. Property carried upon a ferry-boat, in the custody and control of the owner, a passenger, is not at the sole risk either of the ferryman or of the owner. If lost or damaged by the neglect of the ferryman he must respond to the owner. But the latter cannot recover if he is guilty of negligence on his part, contributing to the loss.

When the only possession and custody by a ferryman, of a horse and carriage, is that which necessarily results from the owner's driving the same on board the boat and paying the ferriage, the ferryman is not chargeable with the full liabilities of a common carrier.

In an action against a ferry company to recover the value of a horse and carriage, alleged to have been lost through its negligence, the evidence tended to show that the chain which was provided to be put up as a guard or barrier at the end of the boat, to prevent casualties to horses, etc., was either not up or was entirely insufficient for the purpose. *Held*, that if either fact was established, and the loss resulted from that cause, the defendant was liable. (*See note, p. 656.*)

APPEAL from a judgment of the supreme court at general term, in the first department, affirming a judgment for plaintiff entered upon a verdict.

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ACTION to recover the value of the plaintiff's horse, wagon and harness, claimed to have been lost by reason of the neglect of the defendant. On the 5th day of October, 1866, the plaintiff drove his horse, which was attached to a buggy, upon the ferry-boat of the defendant, at Astoria, for the purpose of crossing to New York; the plaintiff remaining in the buggy. As the boat was about to leave, the whistle sounded and the horse became restive, and, upon a second blast, rushed forward and plunged into the water, and horse and buggy were lost. On the trial there was evidence tending to show that the chain or barrier at the end of the boat, was either not up, or was entirely insufficient for the purpose of protection. The plaintiff had a verdict.

Erastus Cooke, for appellant, cited *Alexander v. Greene*, 3 Hill, 19; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 213; *Wells v. Steam Nav. Co.*, 2 id. 208; *White v. Winnisimmet Co.*, 7 Cush. 154.

H. F. Hatch, for respondent. The negligence of the defendant was established. *Mulhado v. Brooklyn City Railroad Co.*, 30 N. Y. 370. Negligence on the part of the plaintiff, to be contributory to the accident, must be shown to have concurred directly in producing it. *Carroll v. New York and New Haven Railroad Co.*, 1 Duer, 571; *Haley v. Earle*, 30 N. Y. 208; *Clark v. Union Ferry Co.*, 35 id. 485; *Short v. Knapp*, 2 Abb. (N. S.) 241. As a carrier of passengers, the defendant was bound to exercise the highest degree of care and precaution. *Camden, etc., Railroad Co. v. Burke*, 13 Wend. 626; *Hollister v. Nowlen*, 19 id. 236; *Caldwell v. N. J. S. Co.*, 47 N. Y. 282; *Smith v. New York Central Railroad Co.*, 29 Barb. 132; S. C., 24 N. Y. 222. Carriers cannot stipulate for an immunity from all liability. *Dorr v. N. J. S. Nav. Co.*, 11 N. Y. 485; *Miller v. The Same*, 10 id. 431; *Wells v. Steam Nav. Co.*, 8 id. 375; *Smith v. New York Central Railroad Co.*, 29 Barb. 132.

ALLEN, J. A ferryman is not a common carrier of property retained by a passenger in his own custody and under his own control, and liable as such for all losses and injuries except those caused by the act of God or the public enemies. The cases which go the length of holding that the ferryman is chargeable as a common carrier for the absolute safety of property thus carried, and that the owner, in taking care of the property during the passage of the

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boat, may be regarded as agent of the ferryman, do not stand upon any just principle, and are not within the reasons of public policy upon which the extreme liability of common carriers rests. Among the cases to this effect are *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 37 Miss. 691, and *Wilson v. Hamilton*, 4 Ohio St. 722. These suggestions are made necessary by the fact that the supreme court at general term based their judgment upon the doctrine of the cases referred to, and to which we are not prepared to assent. The trial at the circuit, and the recovery there, was upon an entirely different principle, and one more in accordance with our view of the law. While ferrymen, by reason of the nature of the franchise they exercise, and the character of the services they render to the public, are held to extreme diligence and care, and to a stringent liability for any neglect or omission of duty, they do not assume all the responsibility of common carriers. Property carried upon a ferry-boat in the custody and control of the owner, a passenger, is not at the sole risk either of the ferryman or the owner. Both have duties to perform in respect to it. If lost or damaged by the act or neglect of the ferryman he must respond to the owner. The ordinary rules governing in actions for negligence apply; and a plaintiff cannot recover if he is guilty of negligence on his part, contributing to the loss. The liability of a common carrier, in all its extent, only attaches when there is an actual bailment, and the party sought to be charged has the exclusive custody and control of property for carriage. A ferryman does not undertake absolutely for the safety of goods carried with and under the control of the owner; but he does undertake for their safety as against the defects and insufficiencies of his boat, and other appliances for the performance of the services, and for the neglect or want of skill of himself and his servants. At the same time the owner of the property, retaining the custody of it, is bound to use ordinary care and diligence to prevent loss or injury. The duties and obligations of the defendant, a ferry company, were defined by the judge to the jury in the very words of Judge DEWEY in *White v. Winnisimmet Co.*, 7 Cush. 155. When the only possession and custody by the ferryman of a horse and carriage is, as in this case, that which necessarily results from the traveler's driving his horse and wagon on board the boat and paying the usual ferriage, the ferryman is not chargeable with the full liabilities of a common carrier. The duties and liabilities of the ferryman to persons thus using the ferry is thus stated by Judge

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DEWEY. It is the duty of a ferry company "to have all suitable and requisite accommodations for the entering upon, the safe transportation while on board, and the departure from the boat of all horses and vehicles passing over such ferry." * * * "They are also required to be provided with all proper and suitable guards and barriers on the boat for the security of the property thus carried, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveler."

The same principle was adjudged in *Clark v. Union Ferry Co.*, 35 N. Y. 485; and the defendant was held liable for the loss of a horse occasioned by the insufficiency of the chain used as a guard or barrier at the rear of the boat. See, also, *Willoughby v. Horridge*, 12 C. B. 742; *Walker v. Jackson*, 10 M. & W. 161.

At the close of the plaintiff's evidence in the case at bar there was evidence tending very strongly to show that the chain which was provided to be put up as a guard or barrier at the rear or outer end of the boat to prevent casualties, to which travelers passing with horses and carriages would be naturally exposed, was either not up or was entirely insufficient for the purpose; and if either was established, and the loss of the plaintiff's horse and carriage resulted from such cause, the defendant was clearly liable. When a loss has been occasioned by the apparent negligence of the ferryman in providing safe and sufficient means to perform what he has undertaken to the public, the burden is upon him to show that the accident was not occasioned by his fault. There was evidence of negligence to provide or use a proper chain or barrier to prevent accidents of this kind to carry the case to the jury.

If there was any evidence of neglect or want of proper care on the part of the plaintiff, it was not so conclusive as to authorize the court to take the case from the jury and direct a nonsuit. The motion for a nonsuit was properly refused, and the question as to the alleged negligence on the part of the defendant, as well as to contributory negligence on the part of the plaintiff, submitted to the jury. There was no exception to that part of the charge now complained of, in which the judge, after stating the obligations of the defendant in the words given above, says: "You will perceive, therefore, that it was the duty of the defendant to have put up proper and necessary barriers to save the owner of any property from the casualties to which it might, from

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its nature, be possibly subjected." If this particular expression was not strictly accurate the defendant should have excepted to it, and, not having done so, cannot now be heard to object. But it did not mislead; and if the language is stronger than it ought to have been, the judge only intended to apply the rule which he had just before laid down; and all that was intended was to hold the defendant to that degree of care and those provisions for security which would be sufficient to guard against casualties liable to happen, and which might naturally occur. It was a suggestion for the guidance of the jury in this particular case, and was not intended as an instruction to the effect that the defendant was bound to guard effectually against every possible casualty and accident; and, if so intended, it was not applicable to the case in hand, and worked no injury; for the accident was one most likely to occur unless guarded by proper barriers. But it is enough that it was not excepted to. It is next objected that the judge refused to charge the jury that the plaintiff's property was at his own risk; and, secondly, that it was not at the risk of the defendant while on the boat. The judge had already, in a lucid charge, explained with accuracy the nature and extent of the defendant's obligations, and the measure of its liability, and the effect of any negligence or want of care and skill on the part of the plaintiff in the management and control of his horse, and as defeating his right of action if they contributed to the loss; and he properly refused to charge as requested. The property was not at the sole risk either of the plaintiff or defendant; but either might be charged with its loss for neglect or omission of duty in respect to it. Neither was the insurer of the property as regards the other; but both had obligations to perform in respect to it. The property was in the custody of the plaintiff, and not in that of the defendant; but that was not the suggestion of the requests. What was intended by the requests is not very clear. There was nothing practical in them as touching the real questions at issue, and an answer either way would not have affected the result. The action was not against the defendant as a bailee of the property, but for injury and loss occasioned by the wrongful act and neglect of the defendant while the property was in the custody and care of the owner upon the boat of the defendant. The defendant's risk had respect to the sufficiency of its boats and the care and skill of its servants, and did not depend upon any other question. There was no error in the refusal to charge as requested.

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But one other objection is taken upon this appeal, and that is based upon the exception to the exclusion of evidence that Mrs. Wyckoff, the wife of the plaintiff, had said to the witness, after her rescue from the water, that if her husband had got out of the wagon and taken the horse by the head the accident would not have happened. Mrs. Wyckoff, while under examination as a witness, had said she did not remember whether she had or had not said this to the person named. and who was afterward called to prove that she had so said. If such declaration would have been inconsistent with a contradicting of any material statement made by her as a witness, that is, of any statement material to the issue, it should have been admitted in evidence after her attention had been called to it, as tending to impeach her as a witness, and discredit her testimony. The fact was undisputed that the plaintiff did not get out of the wagon and take his horse by the head, and whether his failure to do so was negligent, or a want of proper care and precaution contributing to the casualty, was submitted to the jury. Mrs. Wyckoff was not asked, and did not give her opinion as to the conduct of her husband, the plaintiff, or whether the accident would or would not have happened had he got out of the wagon and held the horse as suggested, so that the declaration would not have been inconsistent with her statements as a witness in that respect. Mrs. Wyckoff had testified at an early stage of the trial that she did not hear any one request the plaintiff to get out and hold his horse, and was asked in the same connection whether she did not afterward say to her husband that if he had got out and taken the horse by the head, as he was requested to do, the accident would not have happened. There was no attempt in any stage of the trial to prove that she had made this statement to her husband or any one else. Afterward the defendant called one or more witnesses who testified that after the blowing of the first whistle which frightened the horse this request was made to the plaintiff, and whether it was so made was one of the questions submitted to the jury. It was just at the close of the trial that Mrs. Wyckoff was recalled and the question put in a different form, and as to a statement to a third person, with time, place and circumstance, but omitting all reference to the request to the plaintiff which was claimed to have been made, and which Mrs. Wyckoff had said she had not heard. The declaration in the form suggested by the question last put was entirely consistent with every part of her testimony. She might have thought

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and expressed the opinion that the plaintiff ought to have got out and held the horse by the head, and might in that way have prevented the accident, and yet not have heard any request from any source that he should do so. That she should have made the statement as claimed would not have lent the least force to the claim or authorized the inference that she had heard the request made as alleged. The remark might well have been made without suggestion to its author from any external source. The evidence was properly excluded. It did not tend to contradict or impeach the witness, and the only purpose it could have served was to get the opinion of the wife as expressed immediately upon her rescue before the jury to the prejudice of the plaintiff.

This was not admissible. The judgment should be affirmed.

All concur.

Judgment affirmed.

NOTE. — In *Harvey v. Ross*, 7 Am. Rep. 505 (26 Ark. 8) it was held that a ferryman is responsible as insurer for all property committed to his care, but that where the owner retains the control of the property, the ferryman is only responsible for due diligence; it was further held that the ferryman would be liable as insurer unless it affirmatively appear that the owner of the property did not entrust the care of the same to him but retained the exclusive management and control of it himself.

In *Powell v. Mills*, 37 Miss. 691, it was held that ferrymen are subject to all the responsibilities of common carriers, and that after property has been put on board their boats it is *prima facie* in their charge, and they are responsible for it, and that it makes no difference that the owner is present unless he consent to assume the charge thereof. In *Slimmer v. Merry*, 23 Iowa, 91, a public ferryman was held to be a common carrier with like duties and liabilities, and therefore liable for not having his boat in condition to transport cattle. To the same effect is *Whitmore v. Bowman*, 4 G. Gr. 148.

In *Le Barron v. East Boston Ferry Co.*, 11 Allen, 812, it was held that a ferry company, being common carriers of passengers, are bound to furnish reasonably safe and convenient means for the passage of teams from their boats, appropriate to the nature of their business, and to exercise the utmost skill in the provision and application of the means so employed; but they are not bound to adopt and use a new and improved method because that it is safer or better than the method employed by them, if it be not requisite to the reasonable safety or convenience of passengers. — RMP.

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McANDREW v. WHITLOCK, appellant.

(52 N. Y. 40.)

Carriers by water — unloading of goods. Negligence.

The plaintiffs shipped, at Liverpool, on the defendant's vessel, 881 cases of licorice, consigned to M. at New York. The vessel arrived at New York on the 25th of August, 1860, and M. was notified. He paid the duties on 181 cases, and entered 200 cases for warehousing, receiving a permit to place them in certain U. S. bonded warehouses, and delivered on board the ship a permit for the discharge of the goods. The defendant was notified that the goods were perishable, and must not be put out in rainy weather. The defendant's agent promised to discharge them in fair weather; and on the 19th of September, he notified the plaintiff's agent that if the next day was fine, he would discharge the licorice. On the 20th, it rained, in the morning, until 9 o'clock; again at 2:30 P. M.; and from 4:20 P. M., continued to rain during the rest of the day and night. At 9 A. M., the defendant's agent began to land the goods upon the wharf, and continued until noon, when the consignee was notified. At that time nearly all the cases were placed upon the wharf, and all were unloaded before 2 P. M. They could not be removed until weighed. A weigher arrived at 2:30 P. M., and finished weighing at 5 P. M. The consignee, though using great diligence, was unable to remove the licorice that day, before the warehouses closed, and a portion of it was wet and damaged by the rain. *Held*, that the referee was justified in finding, as conclusions of law, that the defendant landed the goods without reasonable notice to the consignee to enable him to have the same weighed, carted and protected from the weather; that he placed the property on the dock, with a knowledge of its perishable character, on a day unsuitable to its landing and cartage; and that, in so doing, he was guilty of negligence, and a breach of his duty and obligation as a carrier.

A discharge of cargo from a vessel, with the knowledge and assent of a custom-house officer placed on board for the purpose of superintending the unloading, is not such a delivery as relieves the carrier from his liability as such.

A carrier of goods, by water, may land them at a wharf, at the port of destination, but not until after he has given the consignee due notice of their arrival and unloading, and afforded him a reasonable time to take charge of and secure them. In the mean time, instead of leaving them on the wharf it is his duty to take care of them for the owners.

APPEAL from a judgment of the superior court of the city of New York, at general term, affirming a judgment entered upon the report of a referee.

The action was brought against the defendant as a common carrier by water, to recover damages claimed to have been sustained by

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the plaintiffs, in consequence of the improper delivery by the defendant, of goods brought by him, in his ship, from Liverpool to New York.

' On the 28th of June, 1860, the plaintiffs shipped, at Liverpool, on board a vessel owned by the defendant, 381 cases of licorice, in good order, belonging to them, to be transported to New York. The said licorice was consigned to one McAndrew, the agent of the plaintiffs, and the bill of lading, duly indorsed in blank, was transmitted to him. He was ready, on the arrival of the ship at New York, to receive the licorice, and pay therefor the freight and primage.

On the 25th of August, 1860, the vessel arrived at New York, with the licorice on board. Soon thereafter, and before the 2d of September, the consignee had notice of such arrival. He paid the duties upon 181 cases on the 1st day of September, and entered the remaining 200 cases for warehousing, and received a permit to cart the same in carts provided by himself, and a direction to place them in the United States bonded warehouses Nos. 6, 8 and 10, Bridge street; and delivered on board the ship a permit from the collector for the discharge of the goods from the vessel. The licorice being near the bottom of the vessel, other goods had to be discharged before it could be reached; and the consignee, although he made repeated inquiries, could obtain no definite information when the licorice could be landed.

The defendant's agent was notified by the consignee, that the licorice was perishable, and was requested not to put it out in rainy weather; and the agent promised to discharge it in fair weather. On the 19th of September, the defendant's agent informed the plaintiff's agent that if the weather was fine on the 20th, he would discharge the licorice on that day. On the 20th, it rained in the morning, and continued to rain until 9 o'clock, A. M., with thunder and lightning at 4, fifty minutes past 7, and 8 o'clock, P. M. At 10 o'clock it was clear, and continued clear for one hour, when it became cloudy, and so continued until half-past 2 o'clock, P. M., when it rained. At 3 P. M. it was still cloudy. At twenty minutes past 4 o'clock, P. M., the rain re-commenced, with thunder and lightning, and continued with increasing violence during the rest of the day and ensuing night.

Without further notice to the plaintiffs, or their agent and consignee, the defendant, at or about 9 o'clock, A. M., of that day, commenced landing the licorice in good order, upon the wharf, and

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continued landing the same until about noon, when verbal notice that the landing was in progress was given to the clerk of the consignee. At that time, about 40 cases remained on the ship, all of which were landed in good order, on the wharf, between 1 and 2 o'clock.

A weigher commenced weighing the licorice at about half-past 2 o'clock, P. M., and continued to weigh the cases until 5 o'clock when he finished. The licorice could not be removed from the landing place until it was weighed.

The consignee, immediately after receiving notice that the landing of the licorice had commenced, employed a large number of carts, and used extraordinary diligence to remove the licorice to the United States bonded warehouses, but, notwithstanding, the same was wet and injured by the rain, and depreciated in value. As the bonded warehouses closed at 6 o'clock, P. M., there was not time to remove all the licorice, and 170 cases remained on the wharf during the night, without any protection.

The referee found that the defendant was guilty of negligence and breach of his obligation and duty as carrier of the goods, in landing the same on the dock, with knowledge of their perishable character, on a day unsuitable to the landing and transportation of such goods, without notice to the consignee sufficient to enable him to cause the same to be weighed, transported and protected against injury by the weather. He also found that no negligence was imputable to the plaintiffs or the consignee in respect thereto; and that the defendant was liable for the damage sustained, and he ordered judgment in favor of the plaintiffs therefor. And judgment being entered accordingly, the defendant appeals.

William H. Scott, for appellant. The liability of the defendant ended on the delivery of the goods at the wharf. Abb. on Ship 378; 3 Kent's Com. 215 (9th ed. 291). Notice of the fact of delivery of goods on the wharf is not necessary in addition to the notice of time and place of delivery. *Hyde v. Trent Nav. Co.*, 5 T. R. 389, 394; *Cope v. Cordova*, 1 Rawle, 203; Story on Bailm., §§ 534, 545; Angell on Car., § 310, etc.; 1 Pars. Mar. Law, 152; *Richardson v. Goddard*, 23 How. 28; *The Grafton*, Olcott, 43; *Gibson v. Culver*, 17 Wend. 311; *Chickering v. Fowler*, 4 Pick. 371; *Kohn v. Packard*, 3 La. (Miller) 224; *Ely v. New Haven Steamboat Co.*, 53 Barb. 207; *Redmond v. Liverpool, etc., Steamboat Co.*,

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46 N. Y. 578; *Harman v. Clarke*, 4 Camp. 161; *Goold v. Chapin*, 10 Barb. 612; *Norway Plains Co. v. B. & M. Railroad Co.*, 1 Gray, 271; *Fisk v. Newton*, 1 Denio, 45; *Thomas v. B. & P. Railroad Co.*, 10 Metc. 472; *Garside v. Trent Nav. Co.*, 4 T. R. 581; Chit. & Temp. on Car. (ed. 1857) 154; *Golden v. Manning*, 3 Wila. 429; S. C., 2 W. Black. 916; Add. on Cont (2d Am. ed.) 480; *Gatliffe v. Bourne*, 4 Bing. (N. C.) 314; *Bourne v. Gatcliffe*, 11 Cl. & Finn. 45; *Price v. Powell*, 4 N. Y. 326. The defendant was relieved from any further liability for the goods on delivery thereof to the custom-house officers and to the plaintiff's carman on the wharf. *The Grafton*, Olcott, 43; 3 Kent, 215; *Hemphill v. Chenie*, 6 Watts & Sar. 62.

Augustus F. Smith, for respondent. A carrier is bound to deliver to the consignee personally. *Fisk v. Newton*, 1 Denio, 45, 47. The rule as to carriers by sea and carriers by inland waters is the same, and is stated in Story on Bailm., § 545; *Price v. Powell*, 3 N. Y. 322; *Ostrander v. Brown*, 15 Johns. 39, 42; *Fisk v. Newton*, 1 Denio, 45; Ang. on Car., § 310; 2 Kent, 605; *Barclay v. Clyde*, 2 E. D. Smith, 95; *Chickering v. Fowler*, 3 Pick. 371. The carrier cannot, under any circumstances, place goods upon the wharf and abandon them. *Redmond v. Liverpool, etc., Steamboat Co.*, 46 N. Y. 578; *Ostrander v. Brown*, *supra*; *Fisk v. Newton*, *supra*; Story on Bailm., § 545; 2 Kent, 605. Especially where the consignee is not owner, but a mere agent of the owner. *Goold v. Chapin*, 20 N. Y. 263; *Ostrander v. Brown*, *supra*; 2 Kent, 605; *Chickering v. Fowler*, *supra*.

FOLGER, J. The defendant was a common carrier by vessel, on sea, of goods consigned to one not the owner thereof. As such he was not bound to deliver the goods of the plaintiffs to the consignee thereof in person, nor at his warehouse. *Richardson v. Goddard*, 23 How. (U. S.) 28. He might land them at a wharf at the port of destination. *Chickering v. Fowler*, 4 Pick. 371. But, before unloading there, he must give the consignee due notice of their arrival and unloading, and yield him a reasonable time, after notice given, to take charge of and secure them. *Ostrander v. Brown*, 5 Johns. 39; 23 How., *supra*. And if the consignee did not appear to claim the goods, or did not receive them, or if he was unable or refused to receive them, the carrier was not at liberty to leave them

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on the wharf, but it was his duty to take care of them for the owners. *Id.*; *Redmond v. Liv., N. Y. & Phil. St. Co.*, 46 N. Y. 578; 7 Am. Rep. 390. These rules and others noticed herein, applied to the facts of this case, determine it adversely to the defendant.

There is no question here but that there was due notice to the consignee of the arrival of the goods in port; nor but that there was due notice of the wharf chosen for the unloading of them; nor is there any question but that all the packages came into the actual possession of the consignee.

The questions are, was the notice of the time of the unloading such as was reasonable; and was the landing of these goods made in a proper state of the weather; and did the carrier perform his whole duty in the care he took of them after they were landed?

The question as to notice of the day of unloading is to be determined by a consideration of the facts which occurred on the 19th and 20th days of September. For though the consignee had been notified of the arrival of the goods in port for several days before either of those dates, yet the precise day of unloading had been deferred by the carrier himself until after the 19th. He had been requested to land them on that day but declined. He on that day selected the 20th as the day for discharging them, if it should be a fine day, and then notified the consignee that the goods would be unladen on the 20th if it should be a fine day. There was much importance attached by the consignee to the character of the day, whether fine or not. And very properly so. The goods were perishable, and liable to be damaged by rain falling upon the packages. Of this the carrier had been informed, and had consented to adapt his action to this circumstance. So that it was an important part of this notice for the 20th, that it was conditional upon that day being fine. And by the force of what had taken place between the parties, each undertook to judge for himself in that respect. And for a mistake therein, the one making it was alone liable.

And the result was this: If in fact the day was fine, then the consignee had notice, and the unloading might go on; but if in fact the day was not fine, then, though the carrier might, if he chose, unload, he did so at his risk of any damage to the goods.

We are brought by the findings of the learned referee, and by the evidence in the case, to the conclusion that the day was not such as to put the consignee in the position of having had notice that the unloading was to take place on it; that it was not fine.

It was raining until nine o'clock in the forenoon, and there had thrice been thunder and lightning, once as late as eight o'clock in the forenoon. Rain fell again at about half-past two in the afternoon, and from half-past four in the afternoon it fell during the rest of the day and night.

But without further or other notice to the consignee, the carrier began at nine o'clock to discharge the goods, and so continued until noon, when the consignee was informed thereof. At that time, however, nearly all the packages had been placed upon the wharf, and they were all placed there before two o'clock in the afternoon.

The latter notice to the consignee was not a reasonable notice. For he was not at liberty to remove the goods before they had been weighed by a United States officer, to be sent for that purpose from the custom-house. This officer did not reach the place until half-past two o'clock in the afternoon. And though the consignee used extraordinary diligence and employed a large number of carts, he was unable during that day to secure the property from harm.

The conclusion of law of the learned referee is well founded, that the defendant landed the goods without reasonable notice to the consignee, sufficient to enable him to cause the same to be weighed, transported and protected against injury by the weather.

And as the carrier had knowledge of the perishable character of the goods, and that the consignee had far to cart them, and is, under the circumstances, chargeable with the state of the weather on the day of unloading, the conclusion of law of the learned referee is well founded, that the defendant landed the property on the dock with a knowledge of its perishable character on a day unsuitable to the landing and transportation of such goods. Nor is there any finding nor any evidence that the defendant, after the property was discharged from out of the ship, did any thing to keep it from harm, or that he did any thing to aid the consignee to that end, other than to separate it on the wharf from the property of others. If no notice had been given of the arrival of the vessel, and of the readiness to unload, then the mere unloading the goods on a suitable wharf, even if the time had been suitable, would not have been equivalent to an actual delivery. *Gatliff v. Bourns*, 4 Bing. (N. C.) 314; S. C., House of Lords, 11 Cl. & Fin. 45; and 3 Man. & Gr. 643. We have already stated, that though the consignee had notice of the arrival of the vessel, yet all which took place between him and the carrier, as to notice of the actual unloading, brought the matter to the same point

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as if he had had no notice of arrival. For he was not prepared to avail himself of the actual discharge of the goods on the forenoon of the 20th, because he knew not that they were then to be unladen. Hence, he and the carrier fall within the rule of the case just cited. And if, after the discharge of goods has been had, notice thereof be given to the consignee, then he is entitled to a reasonable time thereafter in which to go or send to the wharf to receive the goods and take them away. *Salmon Falls Man. Co. v. The Tangier*, 1 Clifford, 396. When, then, at noon of the 20th, notice was given to the consignee that the discharge of the goods had commenced, he was still entitled to a reasonable time, which, as we have seen, he did not have. And as, if the consignee not being the owner be unwilling or unable to take charge of the goods, the carrier still remains charged with the duty of saving them from harm, though they be put out of the ship on to a proper wharf (46 N. Y., *supra*); so though the consignee be willing and doing his best endeavor to take charge of and remove the property, if he have not time so to do by reason of insufficient notice, the carrier is not relieved from his obligation to care for the goods and save them from damage. And, sustained by these established principles, the conclusion of law of the learned referee is well founded, that the defendant was guilty of negligence and of a breach of his obligation and duty as carrier of the goods.

It is urged, however, an officer from the custom-house being on board the ship, in the discharge of his official duty to care for the lawful unloading of the cargo, that he was a person authorized to receive the goods, and that a discharge with his knowledge and assent was such a delivery as relieved the defendant from his liability as a carrier.

It was held otherwise by us, after due consideration, in *Redmond v. Liv., N. Y. & Phil. St. Co.*, *supra*, and we adhere to the decision made there.

It is also urged, that a judgment against the defendant holds him liable for the distance of the United States bonded warehouses from the wharf at which his vessel lay. But this certainly enters into the question of reasonable notice and of reasonable time; inasmuch especially as the defendant was apprised of the distance for which the goods were to be carted after delivery should be made to the consignee. For whether notice is reasonable or not depends upon whether or not it gives to the consignee time enough, under all proper and ordinary circumstances, to provide for the care and

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removal of the goods. To be sure, the consignee cannot choose an unusual, out of the way and far distant place of storage, and insist that the notice shall be given and the time shall be allowed for transportation thither. No more so than the carrier can select a wharf inconvenient for the consignee and hold him to usual dispatch. But where the consignee proceeds in the ordinary mode of those engaged in the same business, he is entitled to time enough to take charge of the property, and remove it in due course to a safe shelter, before the carrier can desert it unprotected upon the place of landing.

There is nothing in the findings nor in the evidence, showing that the action of the consignee was unusual in the use of the warehouses chosen by him or allotted to him.

It is claimed that the referee erred in declining to make certain findings of fact as requested by the defendant.

1st. It is true that there was testimony that the barometer was consulted by the defendant's agent, and that it was rising when he began to unlade and while he was unloading. This did not counter-vail the other facts which appeared. The movements of the barometer could not disprove the falls of rain. They were but indications; and if the defendant relied upon them he relied upon them for himself, and not for the plaintiffs.

2d. The referee found as to the rain at thirty-seven minutes past two o'clock, P. M., in exact accordance with the evidence agreed upon by both parties.

3d. It was immaterial that the landing of the goods was under the superintendence of a United States custom-house inspector.

4th. And so, that the licorice, when landed, was placed separate from other goods. The liability of the defendant does not depend upon the contrary.

5th. The referee did find that neither party protected the cases, 170 in number, which remained on the wharf during the night. He found, also, that the consignee used extraordinary diligence to remove the property. But it was immaterial that he did not provide covering for it while on the wharf or during the transit. Had he neglected to do so, and that have been found by the referee, it would not have relieved the defendant from his liability. That was not ended until he had made complete delivery; and that was not effected without an unloading on a notice of time and place, which gave reasonable time for safe removal.

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We do not think that the referee erred in declining so to find, as to vitiate his judgment.

The questions put to the witnesses by the defendant, as to the alleged usage at the port of New York, were properly disallowed. They were improper in form and extent. They called for a conclusion of law, and not matter of fact. The referee assented to the putting of a question as to the fact of a usage. The answers to the questions put, if responsive, would have stated not only the usage, but its legal effect upon the relations of the parties.

The learned counsel for the defendant has cited many cases, some of which he much relies upon as closely analogous to and decisive of this. We do not so read them. *Cope v. Cordova*, 1 Rawle, 203, is fully commented upon in 46 N. Y., *supra*, and shown to be a case resting entirely upon its own facts, and as establishing no general principle; and the same is true of *Ely v. N. H. St. Co.*, 53 Barb. 207, which case, moreover, was substantially overruled in *Russell Manufacturing Co. v. N. H. St. Co.*, 50 N. Y. 121. And it is to be observed, further, that, in *Cope v. Cordova*, the case of perishable articles, which may be landed to the great detriment of the consignee at improper times, is said to be beside the question there considered; and that such special case, when it should arise, would be decided on its own circumstances. The case of *The Tangier*, 1 Clifford, *supra*, we have cited to show that where no notice is given until cargo is discharged the carrier is not relieved until a reasonable time has been accorded to the consignee to take charge of it. And that case goes upon the principle, which the facts of it sustained, that the carrier acted pursuant to a full and reasonable notice to the consignee, and did unlade at a suitable place and time in compliance with that notice; and it holds that the carrier must give such reasonable notice of those facts to the consignee as will enable him, in the usual course of business, to receive and take away the goods.

The case of *The Grafton*, Olcott Adm'y Reps. 43; S. C., 1 Blatchf. 173, is much relied upon by the defendant. But this case starts with the annunciation of the rules we have laid down. It assumes (p. 46) that due notice was given to the consignee by the ship of the time and place of unlading; for without reasonable notice (the decision asserts) it is clear the ship would not be discharged of her responsibility by placing the goods on the wharf. A carrier by water (it continues) cannot leave or abandon, in an unprotected

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state, goods under his charge, even though there be an inability or refusal of the consignee to receive them.

The learned judge seems to have put his decision very much upon the usage of the port. He says: "I think that the result of the cases is *that, in a well-settled course of trade, as it is in this port in relation to coasting vessels*, a delivery of a cargo on the dock here, with notice to the owners of the time and place of unloading, places the goods at their risk, and discharges the ship from its liability as a common carrier." But even then, he adds, "although in the case of a naked consignment, the ship might be under the further obligation to secure the property after it was unladen, if no consignee appeared or he refused to accept the goods." And he says that he does not discuss the point debated at the hearing, as to the liability of the ship if she discharges perishable goods in hazardous or improper weather, against the consent of the owners; and notices the intimation in *Cope v. Cordova*, 1 Rawle, *supra*, that such a circumstance might take the case out of the ordinary rules, and fasten the loss on the vessel.

The case does not lay down a general rule differing from those which we have here adopted. And if there is a difference in the application of the law, it is that the state of facts is different.

The defendant strenuously contends that there is a difference in the obligation as to delivery between a carrier by sea and a carrier by inland water; and that less is exacted of the former. He cites cases such as *Hyde v. Trent. Nav. Co.*, 5 Term R. 389, where BULLER, J., says: "A ship, trading from one port to another, has not the means of carrying goods on land; and, therefore, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." But this language must be understood in the courts of this country with the qualification that due and reasonable notice thereof is given to the consignee. Story on Bailm., § 545; 2 Kent's Com., p. 605, and note c. With such qualification, the language quoted will apply to carriers by sea or on inland waters; and the obligation is the same in each case.

It needs not that we go over all the cases cited. We are sure that we assert no rule here that is not in accordance with the principles of the decisions made upon a state of facts the same or like as that here presented.

The judgment appealed from must be affirmed, with costs to the respondent.

All concur.

Judgment affirmed.

Cook v. The State National Bank of Boston.

**COOK v. THE STATE NATIONAL BANK OF BOSTON, impleaded, etc.,
appellant.**

(52 N. Y. 96.)

National banks — action against in State court. Removal of cause. Certification of check.

Action brought by a citizen of New York, in a State court of New York, against a national bank located in Boston. *Held*, (1) that the court was not ousted of jurisdiction by section 57 of the national currency act (13 Stat. at Large 99), that statute being permissive and not mandatory as to the courts in which a national bank may be sued; and, *semble*, that congress had not the power to deprive State courts of jurisdiction in such cases; (2) that the defendant was a citizen of Massachusetts, within the meaning of the acts relating to the removal of causes to the Federal courts; (3) that the joinder in the action as defendants, of the drawers of the check, would not deprive the bank of the right to alone apply for a removal of the case to the Federal court, the causes of action being distinct and only properly joined by virtue of a State statute; (4) by a divided court, that the cause could not be removed by the bank into the Federal court, under the act of congress of March 2, 1867, as, being a corporation, it could not make the affidavit required by the act.

In an action by a *bona fide* holder of a check drawn on defendant, a national bank, and certified by its cashier, *held*, that the defendant was liable although the drawer had no funds in the bank when the check was certified.

APPEAL from a judgment of the supreme court, at general term, in the first department, affirming a judgment in favor of the plaintiff, entered upon a verdict. S. C., 50 Barb. 339; 1 Lans. 494.

The action was upon a check, drawn by the defendants, Mellen, Ward & Carter, under their firm name of Mellen, Ward & Co., upon the defendant, the State National Bank of Boston, and certified by its cashier. At the commencement of the suit, the plaintiff was a citizen and resident of the State of New York, and a member of the firm of Jay Cooke & Co., of the city of New York, and had been such member for a year previous, and was so at the time of the trial.

The defendant, the bank, was a duly organized national bank, under the national bank act of June 3, 1864, and carried on business in the city of Boston. Mass., and not elsewhere. The defendants, Mellen, Ward & Carter, were, at the time of the transaction in ques-

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tion, money brokers in Boston, under the firm name of Mellen, Ward & Co. They did not appear in the action.

The check, upon which the action was brought, was drawn by Mellen, Ward & Co., upon the State National Bank of Boston, dated Boston, February 28, 1867, payable to Gould or bearer, for \$125,000. Across the face of the check was written, "Good, C. H. Smith, Cash." C. H. Smith was then the cashier of said bank. The check was indorsed as follows:

" Pay J. Cooke & Co., or order,

" AND. J. LOUD, Cas.

" Pay to the order of Pitt Cooke, without recourse to Jay Cooke & Co."

Andrew J. Loud was then the cashier of the Second National Bank, Boston.

The check, with this writing across the face of it, was delivered by Ward, Mellen & Co., to the Second National Bank, together with \$15,000 in bills, on the day of its date, in payment of a draft by Jay Cooke & Co., on said Mellen, Ward & Co., for \$140,050, dated February 27, 1867, drawn against a remittance of \$100,000 in gold certificates, which were sent at the same time to the Second National Bank, to be delivered to Mellen, Ward & Co. on their payment of the draft. The bank, on receiving the check and bills, delivered the gold certificates to Mellen, Ward & Co.

The check was received by the Second National Bank, near the close of business hours, and at the suggestion of Mellen, Ward & Co. it was kept back, and not sent to the clearing house on that day. Mellen, Ward & Co. were not depositors in the State National Bank, and had no funds in the bank at the time. The next day (March 2), the check was presented for payment, through the clearing house, and payment refused.

On the 21st of November, 1866, about three months prior to the receipt of the check by the Second National Bank, a meeting of the banks in Boston was held at the clearing house, to consider the subject of receiving certified checks, instead of bills, in payment. Both the Second National Bank and the State National were represented at this meeting. A resolution was adopted in substance, that the associated banks approved adopting a custom of receiving certified checks, "provided that the directors of each bank, so certifying, shall first have passed a vote agreeing that their respective banks

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shall be bound by such act of certification." Of the banks present, all except three voted in favor of the resolution. The State National was one of the three voting in the negative. The Second National voted in the affirmative. The action of the president of the bank, in voting in the negative, was reported to the board of directors, at its first meeting afterwards, and was approved by the directors. On the 5th of December, 1866, a circular was sent by the manager of the clearing house to all the banks in Boston, members of the clearing house association, and among others, to the Second National Bank, containing the names of the banks which had voted to authorize their officers to certify checks under the resolution, and notifying the banks who intended to enter into the arrangement, to inform the manager of the clearing house, "in order that the banks may receive an early notice of the same." The State National Bank did not enter into the arrangement.

In December, 1868, after this suit was at issue, the defendant, the State National Bank, applied to the court, at special term, upon an affidavit of seven of the directors of the bank, for the removal of the cause into the circuit court of the United States for the southern district of New York. An order was made by Judge CARDOZO transferring the cause to that court, and directing this court to proceed no further in the action, as against the bank, which order was reversed by the general term on appeal, and on re-argument, the general term re-affirmed its former decision, on the ground that Mellen, Ward & Carter were not parties to the application.

On the trial, before the case had been opened by the plaintiff's counsel, a *protest* was made on the part of the bank, that the court had no jurisdiction to hear or try the action, on the ground that it had been removed to and was then pending in the Federal court. And a motion was made to dismiss the complaint for want of jurisdiction on that ground, which was denied. The counsel for the bank also protested that the court had no jurisdiction to hear and try the action, on the ground that under the act of congress of June, 1864, under which the bank had been created a national bank, it could only be sued in a circuit or district court of the United States, held within the State of Massachusetts, or in a court in the county or city in which the bank was located, having jurisdiction in similar cases, and moved to dismiss the complaint for want of jurisdiction, on that ground. This motion was also denied.

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The defendant's counsel also moved to dismiss the complaint on the ground that there was not sufficient evidence to entitle the plaintiff to go to the jury, and also moved the court to direct a verdict for the defendants, both of which motions were denied.

The court directed the jury to find a verdict for the plaintiff for the amount of the check in suit, \$125,000, with interest, to which direction and decision the defendant's counsel excepted. The jury thereupon found a verdict for the plaintiff for \$152,999.88.

E. W. Stoughton, for appellants. After an order is properly made, removing a cause into the Federal court, the State court has no jurisdiction. Act of Congress, March 2, 1867; 14 Stat. at Large, 558; *Kanouse v. Martin*, 15 How. 198; *Gordon v. Longest*, 16 Pet. 97; *Livermore v. Jenks*, 11 How. Pr. 479; *Vandervoort v. Palmer*, 4 Duer, 677; *Ilius v. New Hamp. R. R. Co.*, 13 N. Y. 597; *Stevens v. Phœnix Ins. Co.*, 41 id. 149; see *Bliven v. New England Screw Co.*, 3 Blatchf. 111; *Disbrow v. Driggs*, 8 Abb. 306; *Jones v. Seward*, 26 How. Pr. 436. While the bank was a State bank, Massachusetts was its *habitat*, and from that a conclusive presumption would arise that its officers and managers were citizens of that State. *Rundle v. Del. & Raritan Canal Co.*, 14 How. 80; *Marshall v. Balt. & Ohio R. R. Co.*, 16 id. 14; *Louisville R. R. Co. v. Letson*, 2 id. 497; *Covington Draw Bridge Co. v. Shepherd*, 20 id. 233; *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 286. The rule is the same in respect to national banks. *Manuf. Nat. Bank v. Beaack*, 40 How. Pr. 409; 8 Blatchf. 137. The union of parties, without interest, with the real parties to a litigation, cannot oust the Federal courts of jurisdiction if the character of the real parties is such as to confer it. *Wood v. Davis*, 18 How. 467; *Wormley v. Wormley*, 8 Wheat. 451; *Louisville R. R. Co. v. Letson*, 2 How. 497; *Browne v. Strode*, 5 Cr. 303; *Livingston v. Gibbons*, 4 Johns. Ch. 94; *Ward v. Arredondo*, 1 Paine's C. C. 410; *Norton v. Hayes*, 4 Denio, 245; *Vandervoort v. Palmer*, 4 Duer, 677. Under the act of June 3, 1864, a national bank can be sued only in a circuit or district court of the United States, or in a State, county or municipal court of the State in which the bank is located, having jurisdiction in similar cases. 13 Stat. at Large, 99; 12 id. 665, § 59; *Bank of U. S. v. Doreux*, 5 Cr. 85, 86; *Osborn v. Bank of U. S.*, 9 Wheat. 738, *Crisp v. Banbury*, 8 Bing. 394; *Minor v. Mechs. Bank*, 1 Pet. 46, 64; *Crocker v. Marine Nat. Bank*, 101 Mass. 240. The certifi

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cation of the cashier was void. *F. & M. Bank Case*, 16 N. Y. 125; *N. H. R. R. Case*, 34 id. 30; *Bank of U. S. v. Dunn*, 6 Pet. 51; *Fleckner v. U. S. Bank*, 8 Wheat. 338; *U. S. v. City Bank*, 21 How. 356; *Mussey v. Eagle Bank*, 9 Metc. 306; *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige, 127; *Kirk v. Bell*, 12 Eng. Law & Eq. 385; *Ang. & Ames on Corp.*, §§ 299, 300, 301; *Story on Agency*, §§ 114, 115; 13 Stat. at Large, 19. The rule laid down in *N. Y. & N. Haven R. R. Co. v. Schuyler*, 34 N. Y. 38, if it be now the law of New York is not the law of Massachusetts. *Mussey v. Beecher*, 3 Cush. 511; *Lowell Bank v. Winchester*, 8 Allen, 109; *Benoit v. Conway*, 10 id. 528. Nor is it the law of England (*Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Alexander v. Mackenzie*, 6 C. B. 766; *Stagg v. Elliott*, 12 C. B. [N. S.] 373; *Baines v. Ewing*, Law Rep., 1 Exch. 320), or of the national courts. *Freeman v. Buckingham*, 18 How. 182. The check was certified to be used as currency; the certificate was void, being without power under the organic law, and as creating a currency prohibited by that law. 12 Stat. at Large, ch. 106, §§ 8, 22, 23, 24, 45; *Davidson v. Lanier*, 4 Wall. 447; *Bank of U. S. v. Owens*, 2 Pet. 527; *Root v. Godard*, 3 McL. 102; *Hayden v. Davis*, id. 276; *Safford v. Wyckoff*, 1 Hill, 11; *Smith v. Strong*, 2 id. 241; *Bank of Orleans v. Merrill*, id. 295; *Leavitt v. Palmer*, 3 N. Y. 19; *Veazie Bank v. Fenno*, 8 Wal. 533. Notice to the Second National Bank of a want of authority to certify, on the part of the defendant's cashier, was, in law, notice to Jay Cooke & Co. and to the plaintiff. *Story's Eq.*, 408, and note; *Toulmin v. Steere*, 3 Meriv. 222; *Hargreaves v. Rothwell*, 1 Keen. 154; *Nixon v. Hamilton*, 2 Dru. & War. 391; *Fuller v. Bennett*, 2 Hare, 394; *Gerrard v. O'Reilly*, 3 Dru. & War. 414; *Majoribanks v. Hovenden*, Drury, 11; *Story on Agency*, § 139; *Lowther v. Carlton*, 2 Atk. 342; 1 Liv. on Agency, ch. 10, § 3; *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige, 137.

John E. Burrill, for respondent.

CHURCH, Ch. J. The jurisdiction of the State court is denied upon two grounds: 1. That the national currency act of congress prohibited original jurisdiction; and 2. That the cause has been removed from the State to the Federal courts.

The alleged prohibitory statute is the fifty-seventh section of the aforesaid act (13 Stat. at Large, 99), and provides: "That suits, actions and proceedings against any association under this act *may*

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be had in any circuit, district or territorial courts held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. *Provided, however,* that all the proceedings to enjoin the comptroller under this act *shall* be had in the circuit, district or territorial court of the United States, held in the district in which the association is located."

I think the proper construction of this section is to regard the power conferred, of bringing actions against the associations in specified courts, as permissive and not mandatory. The framework of the section implies that intention. The words "may" and "shall" are both used; the former to confer a privilege, the latter as a mandate. It is presumed that the attention of congress was drawn to the distinction between the ordinary import of the two words, and that they were used with reference to that distinction, and hence that, if it had been designed to limit prosecutions to the specified courts, the same word would have been employed as in limiting a particular proceeding to a specified court.

There are no words of exclusion in the act, and it is a general rule as to jurisdiction, that to confer it upon one court does not operate to oust other courts before possessing it, for the reason that concurrent jurisdiction is not inconsistent. 2 Hill, 164. This rule would be specially applicable to the fifty-ninth section of the act of 1863, of which the section in question is an amendment. By that section, suits by and against these associations were authorized to be brought in the circuit and district courts of the United States, without mentioning State courts; and no one, I think, ever supposed that the privilege conferred by that section precluded actions in State courts. There is some force in the argument that the specification of State courts in the act was unnecessary and useless, unless the clause was intended as restrictive; but this is far from conclusive. Words are often used in a statute for the purpose of producing or preventing a particular inference from other words, and sometimes without necessity or pertinency. After authorizing suits in local Federal courts, a similar power in local State courts may have been deemed proper to prevent an inference that jurisdiction was intended to be restricted to the former. At all events, I am unwilling to hold that the jurisdiction of the State courts was intended to be taken away upon doubtful or ambiguous language.

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Such a construction would enable these associations to delay and defraud their creditors, and produce inconvenience and expense to suitors, involving an amount of injustice which we cannot attribute to the intention of the law-making power. I lay no stress upon the eighth section, because the authority to sue and be sued conferred by that section, confers a corporate attribute and does not relate to jurisdiction.

But if this construction of the act is erroneous, I do not think it competent for congress to deprive the State courts of jurisdiction in all actions against these banking associations. It is proper to observe in the first place that there are no words of exclusion in the constitution itself. The second section of the third article declares that "the judicial power shall *extend* to all cases arising under this constitution, the laws of the United States, and treaties made," etc., and it may well be doubted whether as to such jurisdiction as the State courts before possessed, not relating to subjects growing out of the organization of the government or the specific powers conferred upon it, it was intended to confer by this clause any other than concurrent power. Federalist, No. 82; 2 Hill, *supra*. However this may be, it is clear that the exercise of the power must be confined to the cases to which the judicial power extends, viz., to cases arising under the constitution, laws or treaties of the United States, and unless it can be established that every possible action is a *case* arising under the constitution or laws of the Union, a general prohibition against actions in State courts would be invalid, and a restriction to particular courts, equally so. The case of *Osborn v. The Bank of the United States*, 9 Wheat. 738, is relied upon as authority for the exercise of this power. That was an action in equity, brought by the bank to restrain the officers of the State of Ohio, from collecting a penalty imposed by way of a tax in gross, for its continuing to transact business within the State after a certain period. Upon the theory upon which the bank was created as one of the agencies of the government, that was clearly a case to which the judicial power of the Union extended, and it was competent to authorize such an action to be brought in the United States circuit court, and the question of jurisdiction might have been disposed of by restricting the act to such cases.

The opinion of Chief Justice MARSHALL goes to the length, however, of holding that every action which the bank might bring was a case arising under the constitution and laws of the Union, and

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this was placed mainly upon the ground that the right to sue depended upon its corporate existence, created by Federal power, and that the possibility that this right might be questioned in any suit constituted a case arising under the constitution and laws of the United States, without regard to the fact whether any such question was raised or not.

As an original question, I should doubt the soundness of this view, and prefer to adopt the views expressed in the dissenting opinion of JOHNSON, J. But the decision is not decisive of the question as presented in this case. It would be an unwarrantable extension of the principle of that case to apply it to every action against a corporation created by congress. Whether a corporation was created by one power or another is manifestly immaterial in many actions which may be brought against it. The commencement of a suit admits the capacity of the corporation to be sued, and the very first step of the plaintiff may show that no question can arise of Federal cognizance. Take, for example, an action to recover money, the complaint alleging that the plaintiff deposited \$100 with the bank defendant, which on demand it refused to pay, and issue is joined by a denial that the plaintiff ever deposited the money. Can it be said that this is a case arising under the constitution and laws of the United States? To regard it as such involves the perversion of legal language. Nor can any reason be assigned why a strained or artificial construction should be adopted for the purpose of depriving State tribunals of their legitimate functions. Under the appellate jurisdiction of the supreme court of the United States, which is referable to the same general power as the original jurisdiction, it is well settled that it is not sufficient to show that a question might have arisen, unless it is shown that it did in fact arise in the case. 10 Pet. 368; 12 Wheat. 117. I insist that the possibility of a question does not make a case arising under Federal law; but if it did, in the case supposed, and in most others likely to be brought, it is difficult to see how any such question could be raised.

The existence of the corporation is conceded by suing it as such, and the issue made is confined to the fact of receiving the money. This view can work no injustice to these associations nor deprive them of any right to be heard in the United States court, if the case is one to which the jurisdiction extends, as the right of removal, both on account of the nature of the case and the condition of citizenship, is secured by various statutes.

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The United States Bank was chartered as a fiscal agent of the government, while these associations were created under a supposed power to furnish a national paper currency; but the distinction, so far as it has any bearing upon the present question, is in favor of the jurisdiction of the State courts, and against the power of restriction. Upon all questions respecting State and Federal powers, the utmost fairness and forbearance should be exercised in drawing the line between them. There is no antagonism in theory between the two governments, and if each would refrain from the exercise of doubtful powers, no collision would ever occur. While, as we hold, congress did not intend to oust the State courts of jurisdiction by this act, we are confident that no such power has been conferred by the constitution. If the Federal legislature may create corporations for the transaction of the banking business of the country, and confine all legal proceedings by and against them to Federal courts, it requires only another step in the same direction to create corporations for the transaction of railroad, telegraph, express and manufacturing business, and thus to usurp control over the whole business of the country and the internal affairs of the States, absorbing the judicial functions of State courts and reducing the States themselves to mere government skeletons without power or vitality, a result which no friend of the constitution or of republican institutions can desire.

The second objection to the jurisdiction of the court is that the cause was lawfully removed from the State to the Federal court. The removal is claimed to have been effected under the act of March 2, 1867. No order of the State court is necessary, but the removal is effected by a compliance with the statute. The only discretion which the State court can exercise is in respect to the sufficiency of the surety. 5 Blatchf. 336; 6 id. 362.

The counsel for the plaintiff urges three objections to the validity of the removal: 1. That the bank defendant, being an association organized under the national currency act, is not a citizen of Massachusetts within the meaning of the constitution.

The Federal courts at an early day felt some embarrassment in holding that corporations were entitled to the rights of citizens in suing and being sued, resulting from an opinion then entertained that corporations could not be regarded as citizens within the meaning of the United States constitution. The difficulty was at first overcome by holding that the court would look

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artificial being, to the corporators, and if all of them resided in a different State from the one in which the suit was brought, and where the other party resided, it should be deemed a suit between the corporators and the other party. 3 Cranch, 267; 5 id. 84. These decisions necessarily involved the fact that all corporators must reside in one State. 14 Pet. 60.

But in the case of the *L. C. & C. R. R. Co. v. Letson*, 2 How. (U. S.) 497, this doctrine was modified; and it was decided that a citizen of one State could sue a corporation created by and transacting its business in another State, although some of the members of the corporation were not citizens of that State.

It was stated by Chief Justice TANEY, 1 Black, 296, that the decision in the Letson case was based upon the legal presumption that all the members of a corporation are citizens of the State in which alone the corporate body has a legal existence, and that no averment or evidence to the contrary is admissible; and, hence, that a suit by or against a corporation is a suit by or against citizens of the State which created the corporate body. The same thing had been stated by the same learned judge in 20 How. 232; and is reiterated by BLATCHFORD, J., in *M. N. Bank of Chicago v. Baack*, reported in 40 How. Pr. 409. CATRON, J., in *Rundle v. D. and R. C. Co.*, 14 How. (U. S.) 95, states that the Letson case decided that, if the president and directors are citizens of the State where the corporation was created, and the other party is a citizen of another State, the Federal courts have jurisdiction; while, in *Cowles v. Mercer County*, 7 Wall. 121, the present chief justice states that the decision in the Letson case is, "that a corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen, within the meaning of the constitution, giving jurisdiction founded upon citizenship;" and he adds: "In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the constitution."

With these conflicting views as to the decision in Letson's case, the only safe guide is the opinion pronounced; and with all due respect, it seems to me that it was intended to decide that corporations are citizens of the States which create them, irrespective of the residence of the corporators; and that the presumption of such residence formerly indulged, and whether regarded as one of fact or law, was intended to be ignored and disregarded. WAYNE, J., in

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delivering the opinion, declared that the court intended to decide "that a corporation, created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person;" and, in closing his opinion, adds: "We confess our inability to reconcile these qualities of a corporation—residence, habitancy and individuality—with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all its corporators, being of the State in which the suit is brought. When a corporation exercises its powers in the State which chartered it, that is its residence; and such an averment is sufficient to give the circuit courts jurisdiction."

As an original question, it seems clear that the residence and citizenship of a corporation should be determined without regard to the residence of its corporators. No valid reason is perceived for applying the presumption, or, if applied, it furnishes no ground for the doctrine that the suit is by the corporators in their personal capacity. Although they have an interest in the suit, they are not parties in any legal sense, and their interests are merged in the corporate body. But I cannot agree with the counsel for the plaintiff, that if the doctrine of presumption is to be maintained it would not apply to these banking associations. Their location and place of business are fixed by the law of their creation. They are made inhabitants of States for the purposes of taxation, and a majority of their managing officers are required by law to reside in the States of their respective location. I see no reason why this artificial presumption should not as well apply to them as if incorporated by State authority, especially as in this case where a State bank by virtue of the statute was transmuted from a State to a national bank. The day before the change it is admitted that the presumption would apply, while the day after it is insisted that it would not, although the change was in form only, and not in substance. Independent of this presumption, these banks should be deemed citizens of the States where by law they are located, within this clause of the constitution, and this does not impair the decisions in this State, holding that they are foreign corporations under our attach

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ment laws, although located here, because these decisions are based upon the statutory definition of foreign corporations.

My opinion is that the bank defendant had a right, as citizen of another State, to apply for a removal of the suit. 40 How. Pr. 409.

The next objection is, that all the defendants residing in Massachusetts did not apply, and that it is not competent for one of several defendants residing in another State to remove a suit. This is the general rule. It was frequently so held under the act of 1879, and I think is the rule under all the acts, except the act of 1866, which expressly provides for a removal by one or more defendants. I think also, although with some doubt, that applications under this act must come under the general rule. This doubt arises from the fact that this act was passed as an amendment to the act of 1866, which provided for a removal by one of several parties, and from the peculiar phraseology of the act, that when a suit is pending "in which there is a controversy," etc., between citizens of different States it may be removed, but although called an amendment to the act of 1866, it provides for a new cause of removal and by either party, and for removing the entire suit, and the word "controversy" should be held co-extensive with the whole issue. The general rule, that all the parties must join in the application for removal, is applicable to applications under this act, but the objection is answered by the exception established to the general rule, which is, that improper, formal or unnecessary parties need not join in the application. 8 Wheat. 451; 5 Cranch, 303; 2 How. 497; 4 Johns. Ch. 94. There are in this case two actions in one, against different parties, and the actions are united by virtue of a statute of this State. The action is against the bank defendant as the certifier of the check, and against the other defendants as drawers. It was unnecessary, and, but for the statute, improper to unite the causes of action in one suit. The defenses are distinct and entirely independent of each other, and separate judgments could be entered. It would be unjust to deprive one party of the right of removing his suit, because another action against other parties was allowed to be united in the same suit, and I do not think that a statute of this State can have that effect upon the right of removal by other parties under a Federal law. It is not necessary to determine whether such removal would carry the suit against the other parties into the Federal court or not. My opinion is that it would not, and that by the removal the action would become

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severed, one going to the Federal and the other remaining in the State court.

The last objection to the validity of the removal is, that a corporation cannot avail itself of the act of 1867, by reason of its incapacity to make the affidavit required by the act. It is urged by counsel that this act confers upon one party extraordinary power over the litigation, enabling it, by an *ex parte* oath of mere belief of the existence of a fact, which cannot be contradicted, and after having the benefit of all the "law's delay" in the State court, to remove the suit to another court, and that it should be strictly construed, and hence that it should be held to apply to such a party only as is capable of entertaining and expressing a belief, and that the affidavit can in no case be made by any other than the party himself.

There is a difference of opinion among the members of the court upon the point; and upon consultation we have concluded, as probably the most conducive to the interests of both parties in facilitating the final disposition of the case, to sustain the objection and hold that it was not removed.

This brings us to the exceptions at the trial upon the merits. The views expressed by the supreme court of the United States in the recent case of *Merchants' Bank v. This Same Defendant*, 10 Wall. 604, and which accord with repeated decisions of this court, render an elaborate discussion unnecessary.

The certification of a check, if written out, would contain a statement that the drawer had funds sufficient to meet it in the bank applicable to its payment, and an agreement on behalf of the bank that these funds should be retained and paid upon the check whenever it was presented. The cashier has a right, by virtue of his office, to make this certificate when the drawer has funds. He is the custodian of the funds of the bank and of the books; he receives money and gives vouchers therefor; and whether upon receiving a check he pays it in money or gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is, in either case, acting within the line of his duty and within the scope of the authority which necessarily attaches to his office.

Whether the bank might not restrict this authority, so as to affect the rights of persons having notice, is not material. It is sufficient

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that the public have a right to regard his authority as co-extensive with these duties, and that such authority is inherent in the office. This is substantially conceded by the learned counsel for the appellants, but they insist that the cashier has no power to make the certificate when the drawer has no funds. I agree that he has not, as between him and the bank, and the liability of the bank is not based upon his power to bind them by such a contract without funds, but upon the ground that the bank cannot dispute the fact that there are funds, and hence the contract is enforced as though there were funds to meet it. It follows that a *bona fide* holder only can enforce the liability against the bank, where the certificate is given in the absence of funds.

The bank having placed the cashier in the position which implies this inherent authority, those who deal with the bank have a right to infer that he possesses it, and although the exercise of it in a given case may not be warranted on account of the existence or non-existence of some extrinsic fact peculiarly within his official knowledge, yet the bank is responsible instead of an innocent party, upon every principle of reason and morality. This principle applies to the ordinary relation of principal and agent, and, *a fortiori*, when the employment concerns the general public involving extensive commercial transactions. *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125; *Schuyler's Case*, 34 id. 30. *Ultra vires* cannot be alleged for telling the truth, even by bank officers, nor can they insist upon a falsehood to the injury of one who has confided in their veracity.

The import of a certification and the liability of the bank upon the principle here indicated, legally result from the nature of the agreement and the application of well-settled rules of law, and do not depend upon usage or custom. Whether it is competent for banks, by usage or express agreement, to extend their liabilities so as to include cases where certificates are issued without funds, to the knowledge of the holder, it is unnecessary to determine. SELDEN, J., in 16 N. Y. 128, expressed the opinion that banks have no power to loan their credit in that form. It is clear, however, that where such a certificate is made without funds, by a cashier in fraud of the rights of the bank, no one but a *bona fide* holder can enforce it.

It is claimed by the counsel for the appellants that the refusal of the bank defendant to unite with other banks in Boston in the

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adoption of a custom to receive from each other certified checks in payment for balances and collections, of which the Second National Bank, the agent of the plaintiff's assignors, and who received the check in question, had notice, operated to charge such agent with notice that the cashier had no authority to certify this particular check, and that the principals, Jay Cooke & Co., are chargeable with the knowledge of their agent; and hence that the plaintiff, having only their title, is not a *bona fide* holder. Without inquiring whether all these consequences would follow, I am of opinion that the principal proposition is untenable, viz.: that notice of the refusal to co-operate with the other banks by the bank defendant operated as a notice of a want of authority by the cashier to certify this check. The proposed custom of settling balances at the clearing house by certified checks was a clearing house arrangement for the convenience of the banks themselves, and was subject to such restrictions and regulations as they saw fit to impose or adopt; but the refusal of any particular bank to enter into the arrangement would not affect the power of its cashier to certify checks in the ordinary manner when the drawer had funds, nor the liability of the bank to a *bona fide* holder when he had not.

The most that can be claimed is that the Second National Bank had constructive notice that the defendant refused to approve of the new custom, which was not only confined to a special purpose, but, for that purpose, contemplated an unqualified contract on the part of the banks consenting to it to be bound by certifications, without regard to the presence of funds, which, if valid, could be enforced as a binding contract in cases where an ordinary certificate could not. The case in 9 Metc. 601, was evidently based upon the idea that the liability of banks upon certified checks depended upon usage or custom, and that a teller did not possess the power of a cashier in this respect. The decision was made over twenty years ago, and has not, as I am aware, been repeated by the courts of Massachusetts, although the practice of using certified checks must have prevailed there as elsewhere. It has been repudiated in this and other States, and should not at this day be regarded as the law in Massachusetts, to override a general rule of construction based upon principles of the common law, of universal application.

It is also urged that the court erred in not submitting the *bona fides* of the plaintiff's title to the jury. Ordinarily the question of good faith is a question of fact for the jury. Perhaps if a specific

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request to that effect had been made at the trial, it would have been the duty of the court to submit it, although, with the notice relative to the clearing house arrangement out of the way, I am unable to discern a single fact in the case tending to impeach the good faith of the Second National Bank in receiving this check. It was received in part payment for a draft of \$150,000 on Mellen, Ward & Co., and \$100,000 gold certificates which were parted with and delivered at the time; and no fact is disclosed throwing suspicion upon the transaction. But the answer to the position is that no such request was made, nor was the attention of the court called to it.

The first six requests are substantially that, as a matter of law, the cashier had no authority, and that there was no evidence authorizing the jury to infer it. The seventh request relates to the effect of the notice as to the clearing house arrangement, which has been already referred to. The eighth and ninth are that Jay Cooke & Co. and the plaintiff are chargeable with the knowledge of their agent; and the tenth, that the law in New York is not controlling. These requests, and the additional one asking the court to direct a verdict for the defendants, show that the defendants expected and desired the court to dispose of the case as a question of law; and, as they did not ask that any question of fact should be submitted to the jury, the general exception to the direction to find for the plaintiff is not available, upon appeal, to raise the question.

The result involves, evidently, a considerable loss from the wrongful act of the cashier; but in ethics, as well as law, the party who employed him, and clothed him with the power, should suffer the loss rather than the party who parted with his property upon the faith of the proper exercise of the power. Whenever one of two innocent parties must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it. 2 T. R. 70.

The judgment must be affirmed.

All concur, except ALLEN, J., not voting.

Judgment affirmed.

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MENAGH V. WHITWELL, appellant.

(53 N. Y. 144.)

Partnership — sale of individual interests — when void as to creditors.

One of three partners, with the consent of the other partners, mortgaged his interest in the firm property, to secure an individual debt to plaintiff, who sold the property under the mortgage and bought it in himself. Another person at the same time and in like manner became possessed of another partner's interest. After the executions of the mortgages, but before the sale, the third partner sold his interest to a stranger. After these transactions, a judgment was recovered against the firm on firm debts, and execution was levied on the property which had belonged to the firm, by the defendant as sheriff. In an action of trover against the sheriff, *held*, that plaintiff could not recover, as he acquired no title by the sale under the mortgage as against firm creditors.

APPEAL from a judgment of the supreme court, rendered at a general term in the fourth department, affirming a judgment in favor of the plaintiff, entered upon the report of a referee, in an action for taking and converting personal property.

The property consisted of machinery, utensils, lumber and other chattels formerly owned by the firm of J. C. Smith & Co., and connected with a yeast factory carried on by them. From the 17th of August to the 22d of December, 1866, the firm consisted of John C. Smith, Hollister E. Goodwin, John Wride, Marietta Huntington and William B. Rubert, each being interested to the extent of one-fifth. The firm being indebted to the Geneva National Bank, judgments were recovered, on the 24th of May, 1867, against the persons above named, viz.: one for \$1,403.83, and one for \$237.53. The first-mentioned judgment included claims to the amount of \$330, which accrued after the withdrawal of Wride from the firm. Executions were issued on these judgments on the 25th of May, and placed in the hands of the defendant Ringer, who was deputy sheriff of Ontario county, and he levied upon the property on the 19th of July, 1867, and sold it on the 29th of that month. The defendant Whitwell was sheriff, and this action was brought against him and his deputy for such levy and sale.

The plaintiff claimed title to four-fifths of the value of the property, as follows: On the 22d of December, 1866, John Wride

assigned all his interest in the property and business of the firm to John C. Smith, who agreed to pay the firm debts; and on the 4th of February, 1867, Marietta Huntington assigned all her interest in the firm property to the said John C. Smith, who took her place in the firm. The business continued to be carried on by the remaining partners, under the same firm name.

Both of these transfers were made with the consent of all the other members of the firm, and in good faith, without intent to defraud the creditors of the firm.

On the 28th of February, 1867, the firm then consisting of Smith, Rubert and Goodwin, and Smith's interest being three-fifths, he gave to the plaintiff a chattel mortgage upon his interest in the yeast factory, property, accounts, etc., of the firm to secure his individual debt to the plaintiff of \$2,400, payable in installments in two, five and seven months, with power to take possession and sell in case of default, or whenever she should deem herself unsafe, before default. The referee found that this amount was justly due to the plaintiff for money loaned by her to Smith, which he had used for the firm, and for which it was indebted to him; and that the mortgage was given in good faith, with the consent of all the partners, and without intent to defraud creditors. There was no finding as to the solvency of the firm at the time.

On the 2d of February, 1867, Wm. B. Rubert had given a like chattel mortgage on his one-fifth interest to Samuel E. Rubert, to secure an individual debt of \$500, payable in five days. The referee found that this was a just debt for money loaned, and that the mortgage was executed in good faith to secure the debt, and without any fraudulent intent.

On the 10th of May, 1867, the plaintiff and Samuel E. Rubert took possession of the property mentioned in their respective mortgages, and, on due notice, it was sold on the 18th of May, 1867, the three-fifths interest of John C. Smith being purchased by the plaintiff for \$1,000, and the one-fifth interest of Wm. B. Rubert being bought in by Samuel E. Rubert for an amount less than his mortgage. On the same day, John C. Smith sold and delivered to the plaintiff all his interest in a quantity of lumber, boxes and other material then on the premises, and belonging to the firm, for \$200, which was applied in part payment of the plaintiff's mortgage. The referee found that this sale was in good faith, and without any

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fraudulent intent. This lumber, etc., was levied upon and sold by the defendants, and was embraced in the plaintiff's recovery.

On the same 10th of May, Goodwin, the only remaining member of the firm, transferred his undivided one-fifth interest in the property and business of the firm to Mary B. Goodwin, who still owns the same, but never became a member of the firm.

The only finding of the referee in respect to the solvency of the firm at the dates of these several transactions were, that on the 22d of December, 1866, when Wride withdrew from the firm, transferring his interest to Smith, the firm was largely indebted and somewhat embarrassed, but was not known or believed to be insolvent by either Wride or Smith; and that on the 4th of February, 1867, when Marietta Huntington transferred her interest, the financial affairs of the firm were about the same as they were on the 22d of December, 1866. That the value of the property and assets of the firm depended in part upon the continuance of its business; and that in case such business was continued, and properly managed, the property and assets were more than sufficient to pay the debts.

The referee further found that, at the time of the seizure and levy by the defendants, the property was in possession of the plaintiff and Samuel E. Rubert, and was of the value of \$2,150. That the plaintiff was the owner of an undivided three-fifths, and Samuel E. Rubert of one undivided fifth part thereof; and that on the 15th of August, 1867, and before the commencement of this suit, the said Samuel E. duly assigned to the plaintiff all his right to the property and cause of action against the defendants for seizing the same.

And as conclusions of law, the referee found that at the time of the levy, neither of the defendants in the execution had any leviable interest in the property, but that it belonged four-fifths to the plaintiff, and one-fifth to Mary B. Goodwin; that the bank had no lien thereon, and that the plaintiff was entitled to recover four-fifths of the value, amounting to \$1,720, with interest from the time of the conversion.

The plaintiff recovered four-fifths of the value of the property.

W. F. Cogswell, for appellants. By the mortgages, and the sales thereunder, merely the undivided interest of Smith and Rubert in the partnership property, subject to the payment of the debts of the firm, passed. *Moody v. Payne*, 2 Johns. Ch. 548; *Matter of Smith*, 16 Johns. 102; Story's Eq., §§ 667, 678. Every attempt to

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apply partnership property to the payment of individual debts is fraudulent and void. *Ransom v. Van Deventer*, 41 Barb. 307; *Wilson v. Robertson*, 20 N. Y. 587. The mortgages were void because of the agreement that the mortgagors should continue business with the mortgaged property for their own benefit. *Edgell v. Hart*, 9 N. Y. 213; *Conkling v. Shelley*, 28 id. 360; *Russell v. Winne*, 37 id. 591.

E. Countryman, for respondent. The assignments under which the plaintiff claims were valid, and vested the legal title to four-fifths of the property in the plaintiff. *Dimon v. Hazard*, 32 N. Y. 65; *Ford v. Williams*, 24 id. 359; *Smith v. Howard*, 20 How. 121; Collyer on Part., §§ 174, 894; Story on Part., § 358; Willard's Eq. Juris. 719; *Ketchum v. Durkee*, 1 Barb. Ch. 480; *Conkling v. Shelley*, 28 N. Y. 360; *Cory v. Long*, 2 Sweeney, 491; *Howe v. Lawrence*, 9 Cush. 553; *Miller v. Lockwood*, 32 N. Y. 293; *Russell v. Winne*, 37 id. 591, 597; *Robb v. Mudge*, 14 Gray, 534. Where one partner assigns his interest to another, and retires, the latter acquires a title free from any lien in favor of firm creditors, and may lawfully transfer the property to pay individual debts. *Dimon v. Hazard*, 32 N. Y. 65; *Smith v. Howard*, 20 How. Pr. 121, 124; *Kirby v. Schoonmaker*, 3 Barb. Ch. 47; *Ketchum v. Durkee*, 1 id. 480; *Sage v. Chollar*, 21 Barb. 596; *Cory v. Long*, 2 Sweeney, 491; *Bullitt v. M. E. Church*, 26 Penn. St. 108; *Allen v. Center Valley Co.*, 21 Conn. 130, 137. The transfers of interest having been made in good faith, and with the assent of all the partners, the property of the old firm became vested in the new firms respectively. *Smith v. Howard*, *supra*; *Ex parte Ruffin*, 6 Ves. 119, 128; *Ex parte Williams*, 11 id. 3, 6; Story on Part., §§ 307, 321, 358; *Robb v. Mudge*, 14 Gray, 534. The plaintiff and Robert having taken actual possession of the property prior to the seizure and sale by the defendants, the mortgagors had no remaining interest which was subject to levy and sale on execution. *Mattison v. Baucus*, 1 N. Y. 295; *Galen v. Brown*, 22 id. 37, 39, 41; *Hall v. Sampson*, 35 id. 274; *Levin v. Russell*, 42 id. 251; *Baltes v. Ripp*, 3 Keyes, 210. The partnership estate, so far as the rights of creditors are concerned, is that in which the partners are jointly interested at the commencement of legal proceedings. *Dimon v. Hazard*, *supra*; *Ex parte Ruffin*, 6 Ves. 119, 127; *Howe v. Lawrence*, 9 Cush. 553, 557. In the absence of an affirmative finding of insolvency the

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court will assume, if necessary to sustain the judgment, that the partnerships were solvent at the times of the transfers. *Dixon v. Hazard, supra; Grant v. Morse*, 22 N. Y. 323. A man, though embarrassed, is solvent if he has enough property to pay his debts. *Curtis v. Leavitt*, 15 N. Y. 10, 200, 202; *Leitch v. Hollister*, 4 id. 211, 215; *Herrick v. Borst*, 4 Hill, 650; Bump on Bank. (4th ed.) 448. Partners, while administering their own affairs, have the power, in good faith and for a valuable consideration, to transfer the partnership property to each other or to strangers. *Ransom v. Van Deventer*, 41 Barb. 307, 313; *Wilson v. Robertson*, 21 N. Y. 587; *Van Alstyne v. Cook*, 25 id. 489, 494; *Howe v. Lawrence*, 9 Cush. 553, 556; *Artisans' Bank v. Treadwell*, 34 Barb. 553; *Robb v. Stevens*, 1 Clarke, 192. The legal title of the property in question could not, in equity, be superseded by the equities of the partners or their creditors. *Meech v. Allen*, 17 N. Y. 300; *Stevens v. Bank of Cent. N. Y.*, 31 Barb. 290; *Kendall v. Rider*, 35 id. 100. The defendant Whitwell, from his relation as sheriff to Ringer, his deputy, is equally liable with him. *Waterbury v. Westervelt*, 9 N. Y. 598; *Stillman v. Squire*, 1 Denio, 327; *King v. Orser*, 4 Duer, 431; *Curtis v. Fay*, 37 Barb. 64.

RAPALLO, J. The mortgages executed by John C. Smith and William B. Rubert appear to have been regarded by the learned referee as transferring an undivided four-fifths of the *corpus* of the partnership property therein described. He has found, as to the mortgage from Smith, that it was executed and delivered with the assent of the other members of the firm. This mortgage, if such be its true construction, having been given to secure the individual debt of the partner, even if effectual as to the firm, by reason of the concurrence of all the partners giving it, would be a fraudulent misapplication of the partnership property, and void, as to the creditors of the firm, under the principle of the cases of *Ransom v. Van Deventer*, 41 Barb. 307, and *Wilson v. Robertson*, 21 N. Y. 587, unless the firm were solvent at the time the mortgage was given, and sufficient property would remain, over and above that devoted by that instrument to the payment of the individual debt, to pay the debts of the firm. The supreme court have considered that the findings of the referee fail to disclose any insolvency, but, on the contrary, establish the solvency of the firm at the time the mortgages were given. We cannot concur in this view of the effect of

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the findings, but think that the facts found show that the firm was insolvent when the mortgages were given, and if there were any doubt upon that point, they clearly establish that the diversion of four-fifths of its properties to the individual debts of two of the partners would make it insolvent.

According to these findings, the firm was, in February, 1867, and had been from December, 1866, largely indebted and embarrassed, and the value of its property, and its consequent ability to pay its debts, depended, in part, upon the continuance and proper management of its business. The mortgages were given on the 2d and 28th of February, 1867. If they were intended to be liens upon the *corpus* of the property, as they have been treated by the referee, and not merely liens upon the surplus which should belong to the partners respectively after payment of the firm debts, it is evident, from the facts stated as existing at the time, as well as from the result, that their enforcement would prevent the firm creditors from collecting their demands out of the firm property, and that, under the principle of the cases cited, they were fraudulent and void as to such creditors. If so, the mortgagees, by purchasing at the sale under the mortgages, acquired no valid title as against such creditors, and the plaintiff was consequently not entitled to recover.

Assuming, however, that the mortgages were intended to pass merely the individual interests of the mortgaging partners in the common stock, and for that reason were not fraudulent as to the firm creditors, then it becomes necessary to consider their legal effect upon the rights of creditors of the firm. It is clear that the remaining partner was entitled to the control of the firm property so long as he retained his interest, and to apply it to the firm debts, and that the mortgagees acquired only a right to the surplus, if any, which would be found to belong to the mortgagors on the settlement of the accounts.

And so long as any of the partners had this dominion over the firm property, it can hardly be questioned that it was subject to levy on execution at the suit of a firm creditor. *Lovejoy v. Bowers*, 11 N. H. 404; *Coover's Appeal*, 29 Penn. St. 9; *Pierce v. Jackson*, 6 Mass. 243.

But the point upon which the judgment was sustained in the supreme court, at general term, was, that after the execution of the mortgages H. E. Goodwin, the only remaining partner, made a separate transfer, to a third party, of his individual interest in the

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partnership properties, and, on this ground, it was held that when the execution was levied none of the defendants in the execution had any leviable interest in the property levied upon; and it was further held that the plaintiff, who had purchased the interest of S. E. Rubert, under his mortgage, was entitled, by virtue of the two mortgages and of the purchase at the sale under them, to recover the value of four-fifths of the *corpus* of the partnership property levied upon by the defendants, without regard to the partnership debts.

This position is not without authority in its support. It is founded upon the theory that the separate transfers of the individual interests of all the partners divested the title of the firm; that firm creditors have no lien upon the partnership effects, and no direct right to compel their application to firm debts in preference to individual debts. That the right to compel this application is an equity vested in the partners themselves, and exists only as between each other. That so long as this equity exists in any of the partners, the creditors have an equity to compel its enforcement between the partners, and may, by this means, obtain the application of the partnership properties to their demands, in preference to the individual debts or separate dispositions of any of the partners; in other words, "that the equities of the creditors can only be worked out through the equities of the partners." From these premises, the conclusions have been drawn, that if such equities are waived or released by the partners themselves, the creditors lose them, and that a transfer of the individual interest of a partner in the firm property to a third person extinguishes the equity of the partner, and consequently that of the creditors, which is dependent upon it. This doctrine has been carried to the extent of holding, that if the individual interests of each of the members of a firm are successively sold under executions against such members, respectively, for their individual debts, the purchasers acquire the *corpus* of the property, free from the copartnership debts, and the equities of the partners and partnership creditors are extinguished. *Coover's Appeal*, 29 Penn. St. 9.

The injustice, and it may be said the absurdities, which result from such a view, lead to an inquiry into its correctness. A firm may be perfectly solvent though the members are individually insolvent, yet, in such a case, the doctrine that the property of the firm is divested, and the equities of the partners and partnership

creditors are extinguished, by separate transfers of the individual interests of all the partners, might result not only in an appropriation of all the properties of the firm to the payment of the individual debts, to the entire exclusion of the firm creditors, but to a most unjustifiable sacrifice and waste of such properties. For instance, suppose a firm to consist of three members, each having an equal interest, and to be possessed of assets to the amount of \$300,000, and to owe debts to half of that amount, the interest of each partner, supposing their accounts between themselves to be even, is \$50,000. The members of the firm are individually indebted. One of them sells his share, and receives for it \$50,000, which is its actual value; the share of another of the partners is sold out under execution, and brings its full value, \$50,000. Thus far one partner remains, and he has an equity to have the firm debts paid, and those who have sold out are protected against those debts. The purchasers of the separate interests are entitled to the surplus only; the joint creditors still have their recourse against the partnership property and the right to levy on such of it as is subject to sale on execution; but, before any levy, the remaining partner sells out his individual interest, or it is sold out on execution. According to the doctrine applied in the present case, and maintained in the case of *Coover's Appeal, supra*, the firm property is, by this last sale, relieved from the partnership debts, the two shares first sold are at once changed from interests in the surplus to shares in the *corpus* of the property, free from the debts, their value is doubled, and the fund which should have gone to pay the joint debts is, without any consideration, appropriated by the transferees of the individual interests of the partners.

Such is, in substance, the operation performed in the present case. Assuming that the mortgages are intended to convey only the separate interests of the mortgagors (which, as has been shown, is the only theory upon which they can escape being regarded as fraudulent), the mortgaged property was, at the time the mortgages were given, liable to be taken for the partnership debts. The mortgages were but a slender security, and their value dependent upon the firm debts being paid. This state of affairs continued so long as Hollister E. Goodwin retained his one-fifth interest in the firm. The firm property was legally under his dominion for the payment of firm debts, and the firm creditors, if they then had their execution, could have rightfully levied upon it, or availed themselves of Goodwin's

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equity as to any property which must be reached in that form. But on the 10th of May, 1867, Hollister E. Goodwin made a transfer of his interest in the property of the firm to one Mary B. Goodwin, and on the same day the plaintiff and Samuel E. Rubert took possession under their mortgages. The referee has not found what was the consideration or purpose of this assignment from Hollister E. to Mary B. Goodwin, nor has he expressly found that it was made in good faith. But the effect claimed for it is that Hollister E. Goodwin being the only remaining partner, the transfer of his interest divested him of his dominion over the partnership property, and of his equity to require the application of the partnership property to the payment of its debts, and that as the partnership creditors could only reach the property through him, he, by this transfer or surrender of his rights, had cut off their access to it, and thrown it into the hands of the transferees of the individual partners, unincumbered by firm debts.

Waiving any question as to the *bona fides* of this transaction, the referee not having found it fraudulent, and treating the sale of Goodwin's interest as if it had been made under an execution against him, we come back to the question whether the consequences claimed do legally follow from separate sales of the individual interests of the several partners.

It would be a superfluous labor to trace the history of the changes which have, from time to time, taken place in the views of the courts respecting the nature of the interests of individual partners in the common stock of a firm, and the respective rights of separate and joint creditors; but it is sufficient to observe that they have resulted in a general recognition of the doctrine, that as between a firm and its creditors the property is vested in the firm, and that no individual partner has an exclusive right to any part of the joint-stock until the firm debts are paid and a balance of account is struck between him and his copartners, and the amount of his interest accurately ascertained.

The *corpus* of the effects is joint property, and neither partner separately has any thing in that *corpus*; but the interest of each is only his share of what remains after the partnership debts are paid and accounts are taken. *West v. Skip*, 1 Ves. Sr. 239; *Fox v. Hanbury*, Cowp. 445; *Taylor v. Fields*, 4 Ves. 396; 15 id. 559, note; *Pierce v. Jackson*, 6 Mass. 243; *Doner v. Stauffer*, 1 Penn. (Penrose & Watts. see p. 164) 198; 2 Kent's Com. (11th ed.) 78, note. Collyer on

Part., 3d Am. ed. (Perkins), notes to § 822, pp. 704 to 710; Story on Part., notes to §§ 261, 262, 263; *Crane v. French*, 1 Wend. 311; *Witter v. Richards*, 10 Conn. 37.

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts. 3 Kent's Com. (11th ed.) 76.

Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold, and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm. 3 Kent's Com. (11th ed.) 78, note b.

No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken. 1 Ves. Sr. 241, Am. ed., note; 15 Ves. 557.

No person deriving under a partner can be in a better condition than the partner himself. *Fox v. Hanbury*, Cowp. 445.

A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner, of his undivided interest, cannot avail against the creditors of the partnership who attach the partnership property. *Lovejoy v. Bowers*, 11 N. H. 404.

These principles have been enunciated in a great number of cases where some one at least of the partners retained his equity to have the firm debts paid, and the rights of the creditors to assets or proceeds, which have come under the control of a court of equity, have been worked out through the equity of that partner. But I find no case in which the consequences of transfers of the separate interests of all the partners to outside parties has been considered, except the case of *Doner v. Stauffer* 1 Penn. (Penrose & Watts) 198, and *Coover's Appeal*, 29 Penn. St. 9, before referred to. In neither of these cases is the point adjudicated, for in both cases the joint creditors intervened before the sale of the interest of the last remaining partner, and their right to priority was sustained; though the opinion of the court was expressed as to what the result would have been if all the individual interests had been first sold.

There is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partner-

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ship debts in preference to the separate debts of one partner; that is where a *bona fide* sale has been made by a retiring partner, in a solvent firm of two members, to his copartner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. *Ex parte Ruffin*, 6 Ves. 119; *Dimon v. Hazard*, 32 N. Y. 65. But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the *corpus* of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united in a sale to a stranger. It remained subject to execution for firm debts so long as it continued in the hands of the purchasing partner. It is conceded that the creditors have no lien which would affect the title of a purchaser from the firm. But the question now is, what is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third persons? Where the property remains in specie, and no act has been done by the firm to divest its title, but the partners have made separate transfers of their respective individual interests to different persons, is it still to be regarded, as to firm creditors, as firm property, or has it become the absolute property of the several transferees of the interest of the individual partners?

It has been shown that no share in the *corpus* of the property passed by either of these transfers separately, but merely an interest in the surplus, and which should be ascertained on an accounting after payment of the firm debts. But it is claimed that, when all the partners have assigned, their interest in the property is divested, and their equity is destroyed, and, therefore, the property is released from the debts, and what was, at the time of the assignment, a share of a contingent surplus, has been converted into a share of the *corpus* of the property. Is this position sound? When a partner sells his interest in a firm to a person other than his copartner, or it is sold on execution against him, does he thereby lose all equity to have the firm debts paid out of the assets?

When he sells to his copartner he relies upon his assumption of the partnership debts, and unless he stipulates for an application of the assets to that purpose, he parts with all lien upon them. But

when he sells to a stranger not liable for the debts, or his interest is sold on execution, is not the right to have the debts paid out of the property a right of indemnity personal to himself, and which does not pass by the sale? Could it be tolerated that the interest of a partner should be sold under execution against him, on which sale only the value of his interest in the surplus could be realized, and that the purchaser should be allowed to take the *corpus* of the property and leave him liable for the debts? If the legal effect of the transfer were set forth in the instrument, it would be seen that all the purchaser acquired was a right to an account, and to the partner's share in the surplus, after payment of the debts when ascertained, and that he had no right to that part of the property which was required for the payment of debts; that the sale was subject to the debts. 3 Kents. Com. 76-78. The partner whose share was sold would manifestly have an interest in the protection and appropriation of that part of the property in discharge of his own liability to the firm creditors.

I do not see how this right can be affected by the question whether the separate interests of all or only one of the partners is thus sold. Each of the purchasers would acquire an interest merely in the surplus, and each partner whose interest was sold would have the right to indemnity against the firm debts by the application to such debts of so much of the property as might be necessary for the purpose. These debts must have been taken into consideration in fixing the price of the interest sold, and consequently allowed to the purchaser, and the partnership assets are the primary fund for their payment. The case differs materially from a sale by a retiring copartner to his copartner, who is personally liable for the debts directly to the creditors; but even such a sale is valid only when there is no insolvency at the time. To sell to an insolvent partner would be a clear fraud. How much more clearly apparent would be the injury to creditors by a sale to a person not liable for the debts, if such sale had the effect to relieve the property from them.

It can hardly be necessary, where the firm property remains in specie and is tangible and capable of being levied upon, to resort to the equities of the partners in case there has been no transfer by the firm, and the only adverse claimants are assignees of the individual interests of the several partners for their separate debts. The right of the firm creditor to levy on property thus situated can be sustained on two grounds. If the effect of any of these transfers is

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to divest the title of the firm, then, if effected by the acts of the partner, they are clearly fraudulent and void as to firm creditors, as is shown in the cases of *Ransom v. Van Deventer*, 41 Barb. 307 and *Wilson v. Robertson*, 21 N. Y. 587. An appropriation to the individual debt of one partner of any part of the firm property, even with the assent of his copartners, is illegal and void, provided the firm is not left with sufficient to pay its debts. How absurd it would be to hold that all of the partners, by making separate assignments of their respective shares in the firm property to their individual creditors, could effectually divest the firm of all its property and apply it to their individual debts, leaving nothing for the partnership creditors. But the simple solution of the question is to hold that the title of the firm, as between it and its creditors, to the *corpus* of the property, or at least to so much of it as is necessary for the debts, is not divested by these separate transfers to strangers.

As is stated by Prof. Parsons, in his work on Partnership (chap 10, § 1, pages 356 to 362, 2d), a partnership, though neither a tenancy in common nor a corporation, has some of the attributes of both. The well-established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership is derived from the acknowledgment that a partnership is a body by itself. In its relation to its creditors it is placed upon the basis of having its own creditors and possessing its own property, which it applies to the payment of its debts, and after this work is done, there is a resolution of the body into its elements.

Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individual shares by the several partners can convey a good title to the whole property, free from the joint debts, would be to return to the doctrine, long since exploded, that partners hold by moieties as tenants in common. In the present advanced stage of the law upon this subject, no established rule is violated by holding that the title of the firm, as between it and its creditors, cannot be divested by the acts of the partners severally, not in the business of the firm, nor

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by the separate creditors of members of the firm (further than such temporary interruption of the possession as may be necessary to enable the officers of the law to make an effectual sale of the interest of the debtor partner). This view does not recognize any lien of partnership creditors upon the firm property. The firm have power to dispose of it without regard to the creditors, provided the disposition be not fraudulent. But the individual members or their creditors ought not to have any such power, and all transfers made by them for individual purposes should be held inoperative upon the *corpus* of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners, separately, than when made by a portion of them; but the property should be deemed to continue in the firm until its title has been divested by some act of the firm.

My conclusion is that, as between the firm of J. C. Smith & Co. and its creditors, the property levied upon by the defendants remained the property of the firm, and subject to levy on execution against it, notwithstanding the transfers by the several partners of their respective individual interests.

I have not adverted to the changes which took place in the firm by the retirement of John Wride and M. Huntington, and the transfer by them of their interests to J. C. Smith, intermediate the contracting of the debt to the Bank of Geneva and the levy, the effect of these changes being fully considered in the opinion of my learned associate, ALLEN, J.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

ALLEN, J., delivered a concurring opinion.

All concur in both opinions.

FOLGER and ANDREWS, JJ., not sitting.

Judgment reversed.

St. Luke's Home, etc., v. An Association for Indigent Females, etc.

ST. LUKE'S HOME FOR INDIGENT CHRISTIAN FEMALES V. AN ASSOCIATION FOR THE RELIEF OF RESPECTABLE AGED INDIGENT FEMALES IN THE CITY OF NEW YORK, impleaded, etc., appellant.

(52 N. Y. 191.)

Will—construction of—identity of legatees.

A testator bequeathed \$20,000 to the "Society for the relief of Indigent Aged Females." The plaintiff, "St. Luke's Home for Indigent Christian Females," and the defendant, "An Association for the Relief of Respectable Aged Indigent Females in the city of New York," each claimed to be the legatee intended. *Held* that, the defendant's name answering more closely to that in the will, it was entitled to the bequest.

APPEAL from a judgment of the superior court of the city of New York, at general term, affirming a judgment at special term in favor of the plaintiff.

The action was brought against the appellant and the executors of the last will and testament of John Van Alstyne, deceased, to obtain an interpretation of certain bequests in the will and codicil, and to compel the payment of the amounts to the plaintiff as the corporation intended.

The clause in the will was as follows: "Ninth. I give and bequeath to the society for the Relief of Indigent Females, \$5,000."

The first clause of the codicil was as follows: "I give to the following named legatees the sums hereinafter mentioned, in addition to the amounts given them, respectively, in and by my last will and testament: * * * To the Society for the Relief of Indigent Aged Females, \$20,000."

Samuel Hand, for appellant. Acquaintance with an institution or even a declared intent to bequeath to it is not sufficient to counter-balance greater similarity in name, in a bequest to another institution. *Wilson v. Squires*, 1 Y. & C. 656. The religious opinions of the testator are of slight consequence in interpreting his meaning. *Robertson v. Bullions*, 11 N. Y. 243, and cases cited. When it is impossible to determine which of the two institutions was meant, the court will divide it between them. *Bennett v. Hayter*, 2 Beav. 81; *Simon v. Barber*, 5 Russ. 112; *Smith v. Campbell*, 19 Ves. 400.

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S. P. Nash, for respondent. A legacy may be given to a corporation either by its corporate name or by description. *Button v. Am. Tract Society*, 23 Vt. 336; *In re Gregory*, 11 Jur. N. S. 634; *Smith v. Smith*, 1 Edw. 189; 4 Paige, 271; *N. Y. Inst. v. How's Ex'rs*, 19 N. Y. 84; *Re Briscoe's Trusts*, 26 Law Times, 149. Evidence of the testator's religious opinions is of importance in determining his intent. *Id.* There is no error of the court below for this court to review. *Clark v. Wise*, 46 N. Y. 612; *Wagner's Appeal*, 43 Penn. St. 102.

ALLEN, J. The testator, by his original will bearing date in October, 1865, and a codicil made in June, 1868, gave two sums of \$5,000 and \$20,000, respectively, to a single institution named and described as "The Society for the Relief of Indigent Aged Females."

There are but two claimants of these bequests, both incorporated institutions, and neither bearing precisely the name used in the will and codicil, but each administering a worthy charity, more or less closely assimilating to that indicated by the terms of the bequests.

No one is here to contend that the bequests are void for uncertainty, or invalid for any reason, or that the testator did not have in his mind, and name in his will, as the beneficiary intended, one of these institutions.

A bequest would not be held void for uncertainty as to the legatee, except when it was found impossible, either from the words used alone or in connection with such extrinsic evidence as would be competent, to determine with reasonable certainty the person or corporation intended.

It is well settled that an imperfect or inaccurate description of a person, natural or corporate, will not defeat a gift or grant.

When there are two corporations, neither of which precisely answers the description of the will, and both answering equally well, and there are no circumstances which would incline the court to believe that the testator meant the one rather than the other, it is possible, under the law in this State, the gift would fail, although the courts in England, as it seems, would divide the legacy, and thus give effect to the general intent of the testator, although partially departing from his particular intent. *Alchins' Trust*, L. R., 14 Eq. Cas. 230. This rule has not been, as yet, established with us.

It is not necessary that a corporation should be designated by its corporate name to entitle it to take as legatee. It is sufficient if it

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is so described that its identity can be established, that is, so that it may be distinguished from any other. *The New York Institution for the Blind v. How's Executors*, 10 N. Y. 84; *Bernasconi v. Atkinson*, 10 Hare, 345; *Smith v. Smith*, 4 Paige, 271.

The name is but one of several ways of identifying a person or corporation. A testator might, under some circumstances, be less likely to mistake the objects and purposes of a corporation than the precise title given by the act of incorporation. If there are two corporations, neither of which can claim under the precise name used by the testator, the question, if the name rather than the description is to control, is, which of the two is best or most nearly described by the name? And if the description is to prevail, then the question is, which of the two will best and most closely answer to the delineation of the corporation by the testator? If, from the will and the charters of the two corporations, the court can determine which of the two was intended by the testator, there can be no resort to other evidence in aid of the interpretation. In other words, if, with a knowledge of the name of the two corporations and of their general character and purposes as declared by the laws of their creation, there is no latent ambiguity, there is no necessity for a resort to parol evidence, and it would not be allowable.

If there were no institution in the city of New York for the relief of indigent aged females other than the defendant, it would not be an open question as to its right to the legacies. *The New York Institution for the Blind v. How's Executors*, *supra*. The substantial agreement in name and entire harmony with the description would clearly establish its identity with the institution named in the will. The name in the will is very nearly the baptismal name of the defendant. Substitute the word "association" for "society," and insert "respectable" before "aged," and we have the corporate name of the defendant with entire accuracy, save the transposition of two words not affecting the meaning. The adoption of "society" for "association," as the most usual word, was a very natural mistake by one not having the charter before him. The latter is an unusual word, and one not likely to occur to any one having occasion to refer to the institution by name. The word "indigent" is rather surplusage in the title, for none but that class would need temporal relief, and in establishing and supporting a society for the relief of aged females, the necessity of the objects of the charity would be implied. A variation in words and syllables in naming a

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corporation is not necessarily a misnomer. The omission, transposition or alteration of some of the words composing the name, if there is enough to show that there is such an artificial being, and to distinguish it from all others, will not vitiate a gift or grant. *Newport Mech. Man. Co. v. Starbird*, 10 N. H. 123; *A. & A. on Corp.*, § 99, and cases cited; *id.*, § 185, and cases cited in note 3.

The identity of the defendant with the corporation named in the will is apparent from the name, in the absence of evidence that there is another corporate body of the same or similar name. The names are in substance the same, and almost identical in the words of which the names are composed.

The corporate purposes and objects of the defendant are precisely those called for by the descriptive name given it by the testator. That is, the charity is precisely that indicated by the name adopted by the testator to designate the object of his bounty as well as that indicated by its actual name. The charity is general, unrestricted, including all coming within the description of indigent and aged and belonging to the female sex. The only qualification or limitation is found in the charter title of "respectability;" but that is unimportant. It merely indicates a charity for honest poverty, as distinguished from poverty associated with crime.

The necessary inference is, that the testator meant the defendant, having a name so nearly that used, and administering a charity so well defined by the name chosen to designate the legatee, in the absence of evidence of an institution having the precise name used by him.

It is claimed, however, that the plaintiff is equally well described by the testator, and that the circumstances clearly establish its identity with the corporation named in the will. The charter name of the plaintiff is "St. Luke's Home for Indigent Christian Females." It contains but two of the descriptive words found in the will, "indigent" and "females." The other parts of the title or name serve to give the institution its distinctive character, and have no counterpart in the descriptive title of the institution to which the legacies are given. St. Luke's Home is not synonymous with "society," or an "association for the relief" of the class to be benefited. The prefix is significant, and indicates very clearly a religious, if not a denominational institution, in opposition to a general or public charity. It is a name or title which would not be likely to be forgotten or overlooked by one having or taking an

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interest in the charity. "Home," as used, does not indicate a provision for general relief to be furnished as the necessities of the poor should require, either at the house of the institution or elsewhere, as is practiced by the defendant, but rather the providing a permanent residence for the beneficiaries of the charity, and when read in connection with the constitution and regulations of the plaintiff, it is found that the furnishing of a genial christian home for those who have been in better circumstances, but have become reduced, is really meant. In other respects the beneficiaries of the charity are confined within a limited class of communicants in a single denomination of Christians, and other conditions are found incompatible with the charity described in the will, while the distinctive qualification of age in the objects of the relief is wanting.

The institution of the plaintiff is worthy and well entitled to the sympathy and support of the church of its creation and control. Not one word can be said against its objects, or the terms and conditions annexed to the relief granted. This is only one of the many charities of that denomination of Christians, and but a single class was had in view. The institution was doubtless organized to meet a special want and accomplish one good work, leaving other works of benevolence to be cared for by other instrumentalities. The criticism of the name and of the organization is not intended to depreciate the charity, but merely to show, as it does conclusively, that neither in its name, nor its objects and purposes, has it as close a resemblance to the charity or charitable institution named and described in the will of the testator as has the defendant in both.

A general charity for "indigent aged females" was intended by the testator, and the plaintiff is a charity similar in character but essentially different in its details. The words found in the plaintiff's title, which are not in the testator's description, are important, of the essence of its administration, and necessarily take it out of the description of the charity meant by the will. *In re Alchins' Trust, supra*; *Bradshaw v. Bradshaw*, 2 Y. & C. 74; *Wilson v. Squire*, 1 Y. & C. Ch. 654. In each of the cases cited legacies were adjudged to institutions having names very materially differing from those used by the testators to designate the devisees, and to those of the contesting claimants most nearly answering to the designations of the will, and most in harmony with the intent of the testator, as manifested by the terms of the bequest.

In *Cromie's Heirs v. Louisville Orphan Home, etc.*, 3 Bush (Ky.),

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365, a gift by will to the Presbyterian Orphan Asylum of Louisville was adjudged to the Louisville Orphan Home Society, upon proof that it was generally known and called by the name of the Presbyterian Orphan Asylum, and in the same case "The House of Mercy, New York," was held intended in a gift to "The House of Mercy of the city of New York," as against "The Institution of Mercy," located in the same city. The court was of the opinion there was no ambiguity, and that it was only when unambiguous words would apply with equal certainty to different objects or things, that extraneous testimony was admissible. "When the words clearly apply to a particular person or object, no latent ambiguity can be established by proof *aliunde* of any other person or object of a different description or name." Per ROBERTSON, C. J. See, also, Wigram's Ex. Ev., §§ 6, 9, 215. Evidence of intention is not admissible to show that where the description in the will imperfectly applies to one person and more perfectly to another, the former was really intended. This is not regarded as a strict equivocation. Mr. Redfield says: "There not occurring a precisely equal ground of application of the terms of two subjects or objects, the case must be determined upon the preponderance in favor of one as matter of construction, and there is no occasion to resort to extrinsic evidence." 1 Redfield on Wills, 566, § 13: *Delmare v. Robello*, 1 Ves. 412.

In *re Briscoe's Trusts*, 20 Weekly Reporter, 355, a legacy was decreed to one of two charities claiming it, neither of which could claim under the general description of the will, upon proof that the testator was a subscriber and a life director of the one and always called it by the name used in the will. The words would have applied equally well to either.

In *Bernasconi v. Atkinson*, 10 Hare, 345, the name applied substantially to one of the contestants and the description to the other, and which was meant by the testator could not be determined from the will itself, and extrinsic evidence was resorted to, and the legacy given to the name rather than the description, the vice-chancellor concluding his opinion with the remark: "Upon the whole case I am of opinion that it is less likely that the testator was mistaken in the name of the legatee than in some circumstances connected with him."

In *Button v. The Am. Tract Society*, 23 Vt. 336, neither of the claimants answered the description in the will, and neither came

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any nearer to it than the other. Within the rule, therefore, the will was construed with the aid of extrinsic circumstances.

The defendant has, substantially, the name by which the testator has undertaken to designate the donee of his charity, and in its general objects and purposes precisely squares with the description and name in the will.

The proof of the existence of the plaintiff as a corporate body, having so little resemblance in name to that found in the will, and a purpose and object so far short of that in the mind of the testator, as disclosed by the terms of the bequest, does not create an ambiguity, or authorize a resort to extrinsic evidence to determine the meaning of the testator. The testator, with reasonable accuracy, having described and named the defendant, it is not competent to show by parol that an institution of a different name and character was intended. This would be to make a new will. *Delmare v. Robello*, 1 Ves. 412. The name and description of the legatee in the will, and the names of the two institutions claiming the legacy, being placed in juxtaposition and compared, it will be seen at once that there is no uncertainty or room for doubt as to which of the institutions was meant.

The extrinsic evidence adduced upon the trial is only confirmatory of the conclusions deduced from the will itself, that the defendant's corporation was the institution meant by the testator. It was suggested that this court was concluded by the finding of the court below of the intention of the testator to designate and name the plaintiff as the donee. The judge finds this intention "as a conclusion of fact, and as a construction of said will." Intent is in some cases a question of fact, to be found and proved as such. This is especially so when the intent characterizes the act, making it lawful or otherwise, as it was done with or without a fraudulent or wicked motive.

In such cases the finding of the fact, by the court of original jurisdiction, may be conclusive in this court. So, too, if a devise or bequest is equivocal either as to the subject or the object, and the meaning of the testator cannot be ascertained by a construction of the will with the aids allowed by law, and the intent of the testator, as proved by extrinsic evidence, alone gives direction to and controls the gift, the intent may be a question of fact which this court could not review.

A devise or bequest to "my nephew John," the testator having

two nephews of that name, or a bequest of "my white horse," the testator having two white horses, and nothing in the will or the extrinsic circumstances to indicate which nephew or which horse was meant, are familiar examples of this species of equivocation, and permit evidence of the intent as a controlling fact in giving effect to the will.

It is not necessary to decide whether, in such case, the question of fact would be so entirely distinct from the other questions connected with the construction of the will as to exclude it from the consideration of this court. But the judge has not found the intent solely as a fact, but also as a construction of the will.

The construction of a will or other instrument in writing is always a question of law, and the finding is inconsistent with itself. If the will, by the construction of law, gave the legacies to the plaintiff, the actual intent proved by evidence *aliunde* could not change the direction; and if the will was equivocal, so that the intent could give the direction to the legacy, that fact, and not the legal construction of the will, was controlling. The most that the judge intended was, probably, to find that, construing the will in the light of the surrounding circumstances, the meaning of the testator was to give the legacies to the plaintiff. But in any view of the case, so long as the question is one of construction, every court to which the question may be submitted must necessarily be entitled to the benefit of every circumstance which the law permits to be taken into consideration, as tending to throw light upon the actual meaning of the testator in the use of particular words or terms. It would be a farce to give an appeal upon the construction of a will, and yet deny the appellate court the legal aids to a right determination. This court must, as nearly as it can, and as the court below properly might, place itself in the position of the testator, acquaint itself with the knowledge the testator had of his property, and his relations in life, and the claims upon him, his associations, connections and habits, and all his antecedents, so far as they may be supposed to have given form and character to the expression and terms of his will.

First. The plaintiff lays stress upon the fact that the testator was a communicant in the Episcopalian church, and that the institution of the plaintiff is one of the benevolent institutions of that church. But his religious feelings do not seem to have influenced, to any great extent, his testamentary act; and the circumstance is a very slight one, and entitled to but slight consideration.

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Second. It is claimed that the testator once (in 1863) contributed twenty-five dollars to the institution. He died in 1869; and the fact that he gave this inconsiderable sum six years before his death, and never more took interest in or contributed to its support, dependent as it was upon the contributions of the benevolent for its support, would rather prove that he was not particularly partial to it, or disposed to appropriate largely of his property for it. This was one of the contributions which gentlemen liberally disposed give daily to charities at the instance of friends, without having or taking any especial interest in the particular charity, and is not entitled to any consideration in giving construction and effect to the will.

Third. The evidence of Dr. Eygenbrodt is relied upon as tending to show a favorable inclination of the testator to the institution of the plaintiff. It is difficult to deduce any inference one way or the other from it. After the original will had been made, and before the making of the codicil, the testator, contemplating the establishment of a new charity upon a large foundation, consulted his friend, Dr. E., who dissuaded him from his project and pressed upon him, under some name, the institution of the plaintiff, of which the testator appeared to have full knowledge. But it is noteworthy that in all the interviews the doctor did not get from him an intimation that he had already made provision for it in his will, which would have been very natural if he had in fact done so, or that he would in a codicil or a new will remember it. I am unable to see in this evidence any thing favorable to the plaintiff's claim.

Fourth. The declarations of the testator to his solicitor in giving directions for preparing the codicil are passed over for the reason that the admissibility of such evidence is doubtful, and as it was admitted in behalf of the defendant it is not necessary to consider the question in the view taken of the merits without the aid of this testimony.

Fifth. The defendant was an old institution, existing from 1815, extending the benefits of its charity to large numbers, both at the institution and through the city, and was widely and favorably known, and it is not to be inferred that the testator was more ignorant than his clergyman and solicitor and other gentlemen of intelligence with whom he associated. The plaintiff was incorporated in 1850, and gives relief to a fewer number of persons, and only at the home it provides. These are the leading and prominent

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circumstances brought out by the extrinsic evidence, and they throw but little light upon the meaning of the will. Certainly there is nothing in the evidence to warrant a diversion of the bequests from the defendant, so well and sufficiently described both in the will and codicil, for the benefit of the plaintiff, to which the terms employed have no apparent application.

The meaning of the testator is patent, and the judgment of the superior court must be reversed, and judgment given for the defendant, adjudging it entitled to the legacies given in the will and codicil to "The Society for the Relief of Indigent Aged Females," without costs to either party as against the other.

All concur, except GROVER, J., not voting.

Judgment accordingly.

MILLER, plaintiff in error, v. THE PEOPLE.

(52 N. Y. 304.)

Forgery — indictment — variance.

Neither the indorsements upon a check, nor a revenue stamp attached thereto, form any part of the instrument; and an omission to set them forth in an indictment for forging and uttering the check constitutes no variance. (*See note, p. 707.*)

ERROR to the supreme court in the first department to review a judgment of the general term affirming a judgment of the court of general sessions of the city and county of New York, entered upon a conviction of the plaintiff in error for forgery in the third degree.

The indictment was for forging and uttering a check, set forth therein. Upon the check given in evidence on the trial appeared the indorsement of the payees therein named, and a revenue stamp was affixed thereto.

The counsel for the prisoner requested the court to direct the jury to acquit, upon the ground of variance between the indictment and the proof, in that the indictment did not set forth the indorsement, or the revenue stamp. The court denied the request, and the counsel excepted.

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Wm. F. Kintzing, for plaintiff in error. The instrument alleged to have been forged must be set out in the indictment in words and figures. *People v. Rynders*, 12 Wend. 425; *Rex v. Lyon*, 2 Leach's C. C. (4th ed.) 597; *Rex v. Mason*, 2 East's P. C. 975; *State v. Gaston*, 2 South. 744; *State v. Twitty*, 2 Hawks. 248; *Stephens v. State*, Wright, 70; 1 East's P. C. 80, and n.; *State v. Handy*, 20 Me. 81; 1 Whart. Cr. Law (6th ed.), § 306; 2 Gabbitt's Cr. Law, 231. By the language used in the indictment, the pleader professes to set forth the check verbatim. *Com. v. Wright*, 1 Cush. 46; *State v. Bonney*, 34 Me. 383; *Rex v. Gilchrist*, 2 Leach's C. C. (4th ed.) 660; *Rex v. Carter*, 2 East's P. C. 985; *Rex v. Powell*, 1 Leach's C. C. (4th ed.) 77; 2 East's P. C. 976; 2 Wm. Black. 787. If words are used which imply that a correct recital is intended, the instrument must be set out correctly. *Rex v. Beach*, Cowp. 229; *Rex v. Carter*, 2 East's P. C. 985.

Benj. K. Phelps, for defendants in error.

RAPALLO, J. The counsel for the prisoner claims that there was a variance between the indictment and the proof, in that the forged check produced at the trial bore the indorsement of the payees, while the indictment set forth the check only without the indorsement. There was no averment or proof that the indorsement was forged. The charge was of forging the check and uttering it as true. The check was a complete instrument without the indorsement. The indorsement did not form part of the check, but was a distinct contract. It constitutes no variance, though not set forth in the indictment. *Hess v. State of Ohio*, 5 Ohio, 9; *Com. v. Ward*, 2 Mass. 397; 2 Russell on Crimes, 460. The internal revenue stamp clearly formed no part of the instrument, and the omission to describe it constituted no variance. *People v. Franklin*, 3 Johns. Cas. 299.

The judgment should be affirmed.

All concur.

Judgment affirmed.

NOTE. — See, to same effect, *State v. Mott*, 10 Am. Rep. 153, and note. — RHP.

The First National Bank of Jersey City v. Leach.

THE FIRST NATIONAL BANK OF JERSEY CITY, appellant, v. LEACH.

(53 N. Y. 330.)

The defendant drew his check to the order of D., which was discounted by the plaintiff. It was presented when due to the bank on which it was drawn for certification, and was certified as good. In the afternoon of the same day it was presented for payment, and payment refused, the drawee having in the intermediate time suspended. *Held*, that the certification operated as a payment of the check, as between the holder and the drawer, and the latter was discharged from liability.

APPEAL from a judgment of the supreme court, in the first department, at general term, affirming a judgment in favor of the defendant entered upon a verdict.

The action was brought upon a check drawn by the defendant upon the Ocean National Bank for \$1,410, dated November 21, 1871, and payable on the 12th of December, 1871, to the order of James Dolby. It was delivered to Dolby and discounted for him by the plaintiff. On the 12th day of December, at 11 o'clock, A. M., the plaintiff caused the same to be presented to the drawee for certification, and it was certified as good. The drawer had, at that time, on deposit, sufficient to pay the check, and the amount of the check was charged to him. Within an hour or two thereafter the Ocean National Bank suspended, and a receiver was appointed. The check was presented for payment on the same day, and payment being refused it was duly protested.

The court directed a verdict for the defendant.

William F. Shepard, for appellant. A check presented for payment the day after it is dated is presented in season. *Merchants' Bank v. Spicer*, 6 Wend. 443; *Mohawk Bank v. Broderick*, 13 id. 133; *Hazleton v. Colburn*, 2 Abb. N. S. 199; *Himmelman v. Hotelling*, 6 Am. Rep. 600; *Johnson v. Bank of N. A.*, 5 Rob. 554. Presentment for acceptance or certification and presentment for payment are distinct acts, followed by different consequences. *Merchants' Bank v. State Bank*, 10 Wall. 604, 647; *Mead v. Merchants' Bank*, 25 N. Y. 143, 147; *Farmers', etc., Bank v. Butchers, etc., Bank*, 28 id. 425, 428; *Claflin v. Farmers', etc., Bank*, 25 id. 293, 297; *Irving Bank v. Wetherald*, 36 id. 335, 338; *Willets v. Phoenix Bank*,

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2 Duer, 121, 131; *Harker v. Anderson*, 31 Wend. 372; *Johnson v. Bank of N. A.*, 5 Rob. 554.

Louis C. Waehner, for respondent.

PECKHAM, J. The defendant drew the check in controversy, it was discounted by the plaintiff, and on the day it was due it was presented by the plaintiff to the drawee, the Ocean Bank, for certification, was certified as good, and in the afternoon of the same day was presented for payment, which was refused because between the time of its certificate and its second presentment the drawee, the Ocean Bank, had failed and gone into the hands of a receiver. Did this certification operate as a payment of the check as between these parties?

The theory of the law is, that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself.

The reason therefor is so strong that the law presumes it is adopted by the banks. *Smith v. Miller*, 43 N. Y. 171; *Meads v. The Merchants' Bank of Albany*, 25 id. 148; *The Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 id. 125; *Merchants' Bank v. State Bank*, 10 Wall. 647. It is found to have been done in this case.

If a bank failed to keep such account and to make such entries, it would necessarily incur the peril of the failure of its customers whose checks it certified, without any account of their number or amount, although it would be liable to pay its certified checks to *bona fide* holders, whether it had funds or not. *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, *supra*.

It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

If he apprehended danger from the suspected failure of the bank he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check instead of making a certificate of its being good.

For that reason the drawer could have no remedy against the bank, by any legal proceeding, to secure himself for the amount of

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that check. Hence, if the drawer should get the check back, he would strictly be entitled to get that money, not by virtue of his original deposit, but solely by surrender of the certified check, like any other holder.

But all that has been yet stated applies with equal force to the acceptance of a time bill of exchange before due. Then, when the drawee accepts, it is an appropriation of the funds, *pro tanto*, for the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. Story on Bills of Ex., § 14; 1 Pars. on Notes and Bills, 323.

It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft.

But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that check is good; we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it. The holder says no, I will not take the money; you may certify the check and retain the money for me until this check is presented.

The law will not permit a check, when due, to be thus presented and the money to be left with the bank for the accommodation of the holder, without discharging the drawer.

The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the statute of limitations.

The acceptance of a time draft before due is entirely different; there the holder has then no right to the money, and the acceptor no authority to pay until the maturity of the bill. There is no necessity for presenting a check for acceptance, like a time bill, no authority for such presentment, although the holder has the right to do it. The authority and the duty are to present for payment.

If, however, the holder choose to have it certified instead of paid, he will do so at the peril of discharging the drawer.

He cannot change the position and increase the risk of the drawer without discharging him. *Smith v. Miller, supra.*

This would not discharge the drawer of a check, who himself

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procured it to be certified and then put it in circulation. The reason of the rule fails to apply to him in such case.

I am not aware of any direct authority upon this question; but upon principle it must be held that the bank holds the money, after certification to the holder, not at the risk of the drawer, but of the holder of the check.

The judgment must be affirmed.

All concur.

Judgment affirmed.

WHITAKER, appellant, v. WHITAKER, administratrix, etc.

(52 N. Y. 368.)

Promissory note from husband to wife — validity.

A meritorious consideration is not sufficient, in equity, to sustain a promissory note given by a husband to his wife, as against his collateral heirs.

APPEAL from a judgment of the supreme court in the third department, at general term, affirming a decree of the surrogate of the county of Broome.

Clark Whitaker died November 6, 1869, without issue, leaving his father and three brothers, and the defendant, his widow, him surviving. On the 27th of February, 1871, the defendant, who had been appointed administratrix, presented a petition to the surrogate alleging that she held a promissory note, made by the deceased, given to her in his life-time, and asking that it might be allowed as a valid claim against the estate. The allowance of the claim was contested by the father and brother of the deceased. The defendant produced a note, signed by the deceased, for \$4,000 and interest, dated August 20, 1868, payable to her one day after date. The only consideration claimed for the note was, that the defendant had, aside from her household duties, aided in the out-of-door work upon her husband's farm, and that the maker gave it for the purpose of providing for her support and maintenance.

The surrogate allowed the note as a claim against the estate.

O. W. Chapman. for appellants.

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H. R. Mygatt, for respondent. If necessary to effectuate the intent of the husband, this court may find that the note rests upon a valuable and meritorious consideration. *Hunt v. Johnson*, 44 N. Y. 27; *Brooks v. Weaver*, 3 A. L. J. 283; *Shepard v. Shepard*, 7 Johns. Ch. 57. An agreement between husband and wife by which property is set apart for the separate use of the wife, although void at law, will be sustained in equity, unless the rights of creditors interfere. *Slanning v. Style*, 3 Wms. 337; *Kelley v. Campbell*, 1 Keyes, 30; *Christ's Hospital v. Budgin*, 2 Vern. 684; *Reeve's Dom. Rel.* 38; 3 Paige, 452; *Clancy on Husb. and Wife*, 272, 276; 1 Dev. Eq. 187; 1 Dessaus. 158; 15 Vt. 527.

PECKHAM, J. The sole question in this case is, whether a meritorious consideration is sufficient in equity to sustain a promissory note given by a husband to his wife as against his collateral heirs.

The note cannot be sustained as a *donatio mortis causa*. That is not pretended; nor as a payment for a debt, though that is claimed. But I agree with the supreme court, that there is no ground for that claim. If a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household (which I do not perceive and cannot admit), the law makes no such distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services. In most cases she probably contributes more to the happiness of her family by the proper discharge of the delicate and responsible duties of her household, than by any outside labors, however arduous. It is clear that the law regards neither as any consideration for a promise founded thereon from the husband.

Then, is the meritorious consideration arising out of his moral obligation to provide for her reasonable maintenance sufficient to support this note?

Prior to the decision of *Ellis v. Nimmo*, in 1835, Lloyd & Gould's Rep. 333, there were various *dicta* in the English books, as well as in American reports, to the effect that, in cases of contracts merely voluntary, courts of equity would do nothing; but they did not include therein contracts of a valuable or meritorious consideration. *Pulverstoft v. Pulver*, 18 Ves. 84, at 98, in 1811; *Ellison v. Ellison*, 6 id. 662; *Coleman v. Same*, 3 Bro. C. C. 12; 1 id. 50; *Bunn v. Winthrop*, 1 J. C. 329, at 336. But in *Ellis v. Nimmo*, Sir EDWARD SUGDEN gave the question deliberate consideration, and finally dis-

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tinctly held that a meritorious consideration, the love of a father for his wife or child, in that case his daughter, was a sufficient consideration to uphold a written agreement for a provision for her, and its specific execution against his heir was decreed accordingly.

The lord chancellor gave the question a good deal of examination and delivered an able opinion. He observed that it was a singular circumstance that the question had never before been decided.

It was clearly then the first authority to that effect in England, and I think it may be said, with equal clearness, that it was the last.

It has never been followed in the British courts, but its rule has been denied there whenever alluded to. *Holloway v. Headington*, 8 Sims. 324; *Jefferys v. Jefferys*, 1 Crai. & Phil. 137; *Dillon v. Coppin*, 4 M. & C. 647; *Joyce v. Hutton*, 11 Irish Ch. 129, in 1860, by master of the rolls, stating the law to be the reverse of that declared in *Ellis v. Nimmo*; upon a rehearing in *Ellis v. Nimmo*, before Lord PLUNKET, successor to Sir E. SUGDEN, the decree was affirmed, *but upon other grounds*. This appears by the report of the case.

Finally, Sir EDWARD SUGDEN, in 1846, in reference to that case, remarked that, before that was decided, there was a general impression that a voluntary contract, though meritorious, could not be enforced in this court, and that impression has not been overruled. I drew the distinction between a mere voluntary agreement and a voluntary agreement to provide for a wife or a child — I did not carry it further — which I thought and still think ought to be enforced; but I consider that decision to be overruled by the current of opinion and authority, and I have no desire to support it against the general opinion. *Moore & Crofton, Janes & La Touch's R.*, at 442.

We are not referred to any decision in the United States that sustains the respondent's case. There are more *dicta* to that effect, especially in Kentucky — where it came nearest to being decided, though not necessarily decided, as each case went off upon another ground — but no decision that I am aware of. But in Kentucky the court declare that the "whole foundation of the rule is of doubtful equity." *Buford v. McKee*, 1 Dana, 107.

We are referred to many decisions in other States against this claim.

Philips v. Frye, 14 Allen, 36, is a late case. It reviews the authorities, and holds a mere meritorious consideration to be insufficient. It covers this case in all points.

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The decisions in this State are to the same effect. It was at one time held that one's own promise in the shape of a note, without any consideration, was the valid subject of a gift, *mortis causa*, by the maker. *Wright v. Wright*, 1 Cow. 598. But the law is now well settled the other way. *Craig v. Craig*, 3 Barb. Ch. 76, 115; *Harris v. Clark*, 3 N. Y. 93.

Duvoll v. Wilson, 9 Barb. 487, is an authority directly upon the case at bar. The cases are reviewed and the conclusion arrived at that a meritorious consideration, or the duty to provide for a wife or child, is not sufficient to support an executory covenant.

There is no decision at war with this in this State.

Hunt v. Johnson, 44 N. Y. 37, was a case of an executed sale or transfer of real estate. So the court held, natural affection is confessedly a sufficient consideration to uphold an executed conveyance.

The text-books all substantially agree that a meritorious consideration is insufficient to justify the interference of equity to enforce an executory promise for the benefit of a wife or child.

It seems to me the true policy of the law to avoid giving life in equity to this sort of last will.

It is a method most open to fraud. Although a will requires two witnesses, a note requires none. It requires no great skill so to counterfeit a man's signature as to find witnesses to believe in its genuineness; and a little strength is then added by what is well regarded as the weakest evidence, oral confession, of the deceased.

While a man lives, a legal obligation rests upon him to sustain his wife and children. When he dies the law declares what is the proper share of his property — the legal and equitable share — that belongs to each of them. If either claim more, the claim should be founded in the law. If it do not allow enough, it may be safely enlarged by statute.

The decree of the supreme court and that of the surrogate must be reversed, and the claim of the respondent upon the note disallowed, without costs to either party, and proceedings remitted to surrogate with these directions.

All concur.

Ordered accordingly.

McKnight v. Devlin.

McKNIGHT v. DEVLIN, impleaded, etc., appellant.

(52 N. Y. 300.)

Promissory notes — failure of consideration — recoupment of damages. Vendor and purchaser.

In an action upon promissory notes given in part payment for a distillery and fixtures, the defense set up was that by reason of certain violations of the revenue laws, by the payee of the notes and vendor of the property, prior to the purchase by the defendant, a portion of the property was, after such purchase, seized, condemned and sold by the officers of the United States, whereby the defendant's title failed and the property was lost. On the trial the defendant put in evidence the record of the seizure and condemnation. It did not disclose by whom, or at what time, the penalty which worked a forfeiture and loss of the property was incurred. An offer of the defendant to prove by extrinsic evidence, that the illegal acts established by the decree were done by those operating the distillery before the purchase by him, was excluded by the court. *Held*, that such exclusion was error.

A vendee of chattels, in case of failure of title to a portion thereof, is not bound to rescind the contract *in toto*, but may retain so much as he has secured a title to, and recover damages for the loss of the residue. It is optional with him to recoup such damages in action against him for the purchase-money, or to bring an action therefor; and such option is not defeated by a transfer of the claim against him, and the bringing of an action in the name of the transferee, except in cases where an indorsee or transferee of negotiable paper acquires a title discharged of all equities, and valid against all defenses.

APPEAL from a judgment of the supreme court in the first department at general term, affirming a judgment in favor of the plaintiff, entered upon a verdict.

The action was brought upon two promissory notes made by the defendant Devlin, payable to the defendant Earle, and indorsed by the latter to the plaintiff. The defendant Devlin only answered. He admitted the making and delivery of the notes, but alleged that the plaintiff took them without consideration and with knowledge of the defendant's defense; that they were given for certain distillery fixtures conveyed by Earle, who covenanted and agreed to warrant and defend, etc.; that the title was nominally in Earle, but actually in Bagley and Keenan who were in possession; that by the previous unlawful acts of Earle, Bagley and Keenan, in violating the United States revenue laws, the property was afterward seized.

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taken from the defendants by the United States officers, condemned and sold and wholly lost to the defendant. The defendant claimed to recoup his damages.

On the trial the defendant proved the seizure and sale, and that the plaintiff had full notice of all the facts, and of the defendant's equities, before he purchased.

D. C. Calvin, for appellant. Notice of any equities between the original parties, or of any defect in the title, is sufficient to prevent the immunity of a *bona fide* holder. *Belmont Branch Bank v. Hoge*, 35 N. Y. 65; Story on Prom. Notes, § 197; *Steinhart v. Boker*, 34 Barb. 436; *Mages v. Badger*, 34 N. Y. 247. The fraudulent concealment of the liability of the property to seizure avoided the sale, and the defendant may recoup his damages for the purchase price. *Van Epps v. Harrison*, 5 Hill, 63; *Burton v. Stewart*, 3 Wend. 236; *Beecker v. Vrooman*, 13 Johns. 302; *Sill v. Rood*, 15 id. 230; *Gillespie v. Torrance*, 25 N. Y. 306; *Fabbricotti v. Launitz*, 3 Sandf. 743; *Batterman v. Pierce*, 3 Hill, 171; *Spalding v. Vandercook*, 2 Wend. 431. To avail himself of the breach of warranty, it was not necessary for the defendant to rescind the contract. *Harris v. Bernard*, 4 E. D. Smith, 195; *Warren v. Van Pelt*, id. 202; *Reab v. McAlister*, 8 Wend. 109; *Norris v. LaFarge*, 3 E. D. Smith, 375; *Muller v. Eno*, 14 N. Y. 597; *White v. Seaver*, 25 Barb. 236. It was competent to show by parol the real grounds of complaint and condemnation. *Briggs v. Wells*, 12 Barb. 567; *Stedman v. Patchin*, 34 id. 218; *Royce v. Burt*, 42 id. 655; *Doty v. Brown*, 4 N. Y. 71; *Dunckel v. Wiles*, 11 id. 420; *Kerr v. Hays*, 35 id. 331. A warranty would have been implied by the fact of sale. *Sweet v. Colgate*, 20 Johns. 196; *Hoe v. Sanborn*, 21 N. Y. 552; 2 Kent's Com. 478; *Beckman v. Bormann*, 3 E. D. Smith, 409.

E. Cook, for respondent. The defendant should have rescinded on discovering the fraud. *Curtis v. Howell*, 39 N. Y. 211.

ALLEN, J. The plaintiff became the owner of the notes in suit, with full notice of the defense now set up, and of the equities of the defendant, and is not, therefore, entitled to the protection accorded to *bona fide* holders of negotiable paper. The notes were subject to the same defenses in his hands that they would have been in the hands of the original payee. *Skilding v. Warren*, 15 Johns. 270; *Kasson v. Smith*, 8 Wend. 437; Story on Prom. Notes, §§ 190, 197.

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The notes were given for personal property; and, in the absence of an express warranty of title, the law would imply such warranty. Every vendor of chattels is supposed to know his title, and to warrant it, if he sells without disclosing any defects that may exist in it. *Swett v. Colgate*, 20 Johns. 196; *Hoe v. Nanborn*, 21 N. Y. 552.

In this case there was an express warranty of title by the seller, the payee of the notes. The allegation of the defense is, that there was a failure of title to a large part of the property by reason of the illegal acts of the seller, subjecting the same to forfeiture under the revenue laws of the United States. The defendant had the benefit of his purchase in respect to a small part of the property, which he sold before the seizure by the government; and there was, therefore, but a partial failure of consideration. As between the payee and maker of the notes, a total failure of consideration would have been an absolute bar to an action; and a partial failure, a defense *pro tanto*. The maker would have been at liberty to recoup his damages, by reason of the failure of title to a part of the property, in an action upon the notes. He would not have been bound to rescind the contract *in toto*, but might retain so much of the property as he had secured a title to, and have his damages for the loss of the residue. *Muller v. Eno*, 14 N. Y. 597; *Beecker v. Vrooman*, 13 Johns. 302; *Spalding v. Vandercook*, 2 Wend. 431; *Batterman v. Pierce*, 3 Hill, 171; *Van Epps v. Harrison*, 5 id. 63; *Gillespie v. Torrance*, 25 N. Y. 306. The right of recoupment is distinguishable from a mere right of set-off. It corresponds with the convention of the civil law, in which the defendant was permitted to exhibit his claim against the plaintiff, provided it arose out of or was incidental to the plaintiff's cause of action. Bouv. Law Dict. Upon a recoupment proper, the defendant cannot recover any excess of damages over the plaintiff's claim; nor can he have an independent action for that excess. *Gillespie v. Torrance*, and *Batterman v. Pierce*, *supra*. It is optional with a defendant whether he will recoup his claim growing out of the same contract upon which the action is brought, or resort to an independent action; and this option is not defeated by a transfer of the claim, and the bringing of a suit in the name of the transferee, except in cases where an indorsee or transferee of negotiable paper acquires a title discharged of all equities, and valid against all defenses. The plaintiff took title subject to all legal and equitable defenses which existed against the notes in the hands of the payee: and the right of the defendant

to set up a partial failure of title to the property for which the notes were given, as a defense, *pro tanto*, was perfect.

The defense alleged was that, by reason of certain violations of the revenue laws by the payee of the notes and vendor of the property, and those acting with or under him before the purchase by the defendant, the still and the major part of the other property was liable to seizure and forfeiture to the United States; and that after the plaintiff took possession under his purchase the same was seized, condemned and sold for those violations of law, whereby the title wholly failed, and the property was lost to the defendant. The record of the seizure and condemnation was put in evidence, including the libel of information, and an affidavit, a part of the record, by which it appeared that one Hugh Fisher was the informer against the property. The libel was general, alleging in different paragraphs an infraction of every provision of the statutes, which would work a forfeiture and authorize a condemnation of the property, without any allegation of the time or times at which the offenses were committed.

The record alone, then, could not and did not disclose by whom or at what time the penalty was incurred which worked a forfeiture of the property. But it was competent to aid the record, and supply this proof by extrinsic evidence. *Doty v. Brown*, 4 N. Y. 71; *Dunckel v. Wiles*, 11 N. Y. 420; *White v. Madison*, 26 id. 117. Such evidence is not in contradiction of the record, but consistent with it, and of facts essential to give effect to it. Such evidence was very broadly, and in different forms, offered and excluded. The offer was, in substance, to prove, the informer being under examination as a witness, specific violations of the revenue laws by the prior owners of the distillery, before the purchase by the defendant; and that for those illegal acts the property was condemned and sold. In other words, that the illegal acts of those operating the distillery before the purchase by the defendant were reported to the government, and mentioned in the libel, and established by the decree. The objection to the evidence was upon two grounds: that the defendant could not contradict the record, and that the defense was unavailable, because there had been no attempt by the defendant to rescind the contract; and the objection was sustained. Neither of these objections, as we have seen, were well taken. It is now sought to sustain the exclusion of the evidence on the ground that the answer alleged a different offense as the cause of forfeiture from any

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alleged in the libel of information. The answer does substantially aver illegal acts which are embraced in the libel, although in somewhat different language; the libel adhering more closely to the words of the statute declaring the offense and imposing the penalty; and the judgment cannot be sustained on this ground. Another answer, however, is that the objection to the sufficiency of the answer was not taken at the trial, and cannot, therefore, be taken here. If the answer was defective in not sufficiently stating the acts by which the forfeiture was incurred, the objection to the evidence should have been upon that ground; and, if well taken, the answer could have been amended. Not having been taken then, as it might have been obviated, it was waived. *Kerr v. Hays*, 35 N. Y. 331.

The judgment must be reversed and a new trial granted.

All concur.

Judgment reversed.

DAY v. POOL, appellant.

(33 N. Y. 412.)

Vender and purchaser—breach of warranty—return of property.

Upon an executory contract of sale, with a warranty as to the quality of the article contracted for, the purchaser is not bound to return, or offer to return, the article on discovering that it is of an inferior quality, but he may retain and use the property, and have his remedy upon the warranty. But the purchaser in an executory sale cannot rely upon a warranty, as to open, plainly apparent defects, any more than he could upon a sale of goods *in presenti*.

APPEAL from a judgment of the supreme court, at general term, in the fourth department, affirming a judgment in favor of the defendants, entered upon an order of the court, at the circuit, nonsuited the plaintiffs.

The action was brought to recover damages for an alleged breach of warranty in an executory contract for the sale and delivery of eighty barrels of rock-candy syrup. S. C., 63 Barb. 506.

Norris & Russel, for appellants. The plaintiffs having, after an opportunity for examination, accepted the goods, they are bound by

that act. *Reed v. Randall*, 29 N. Y. 358; *Beck v. Sheldon*, 48 id. 365; *McCormick v. Sarson*, 45 id. 265; *Neaffie v. Hart*, 4 Lans. 4; *Sprague v. Blake*, 20 Wend. 60; *Howard v. Hoey*, 23 id. 350; *Hart v. Wright*, 17 id. 275; *Leavenworth v. Packer*, 52 Barb. 133; *Hargous v. Stone*, 5 N. Y. 73; *Gillespie v. Torrance*, 25 id. 306; *Muller v. Eno*, 14 id. 601; *Fitch v. Carpenter*, 43 Barb. 43. The words "warranty" or "express warranty," when used in executory contracts, amount only to an agreement that the vendor will perform his contract. *Hopkins v. Appleby*, 1 Stark. 388. Paying the defendants for the syrup was an accord and satisfaction. *Beck v. Sheldon*, 48 N. Y. 373.

Murray & Pattison, for respondents. Upon a sale of goods to be delivered at a future day, with an express warranty as to quality, the right of action for a breach continues after the receipt and use of the goods, without notice of defects or any offer to return. *Waring v. Mason*, 18 Wend. 425; *Beirne v. Dord*, 5 N. Y. 95; *Muller v. Eno*, 14 id. 597; *Reed v. Randall*, 29 id. 358; *Foots v. Bentley*, 44 id. 166; *Bennett v. Cook*, 45 id. 268. If there is a special warranty, and a breach, the plaintiff is entitled to such damages as were consequent upon the breach. *Passinger v. Thorburn*, 34 N. Y. 637; *Randall v. Roper*, 97 Eng. Com. Law, 82.

PECKHAM, J. Action for damages for alleged breach of warranty upon a contract to sell and deliver to plaintiffs, at a future day, eighty barrels of rock-candy syrup. The contract of sale with warranty was proved, or sufficiently so for the jury, and the breach; but it also appeared in proof that the plaintiffs, after receiving the syrup, and discovering its failure to comply with the warranty, proceeded to use it in their business of wine manufacture, and neither returned nor offered to return it. Upon this ground the plaintiffs, on defendants' motion, were nonsuited at the circuit. It appeared that the plaintiffs required and desired to purchase for their business, in a western county, an article of rock-candy syrup "that would not crystalize, or the sugar fall down," in its use.

This the defendants, merchants in the city of New York, undertook to sell to them, and to warrant in these respects. The syrup was manufactured in Boston; but samples of the syrup were shown at the time of the contract to the plaintiffs. It was to be ordered by defendants from Boston. It was all to be sent to plaintiffs by the 15th of October then next, in two car loads.

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It was in fact delivered in small parcels, at different times, up to the last of November.

The plaintiffs complained of the deficiency of the syrup at various times to the defendants while they were delivering it; at one time sent a sample of that already received, complaining of its deficiency; and the defendants promised to correct it (though they insisted it was then sound). If not, they could "do it at the end." The plaintiffs paid for the syrup in full before suit.

The question presented is, did the plaintiffs' claim for damages survive their acceptance and use of the syrup, or were they bound to return or offer to return the defective syrup as soon as its deficiency was discovered? In other words, were they bound to rescind the contract, or could they use the syrup and rely upon their warranty?

There seems very little authority upon this precise point in this State, viz., as to an executory sale, with warranty as to quality of the article contracted for.

It is well settled that, upon a sale and delivery *in presenti* of goods with express warranty, if the goods upon trial or full examination turn out to be defective, and there is a breach of the warranty, the vendee may retain and use the property, and may have his remedy upon the warranty without returning, or offering to return. In fact, it seems to be regarded as settled in this State, though, perhaps, not necessarily determined in any case, that he has no right to return the goods in such case, unless there was fraud in the sale. It is not necessary to decide that point in this case. *Voorhees v. Eckler*, 2 Hill, 288; *Muller v. Eno*, 14 N. Y. 597; *Rest v. Eckle*, 41 id. 488; *Foot v. Bentley*, 44 id. 166. See, also, Story on Sales, § 421, and cases cited; *Thornton v. Wynn*, 12 Wheat. 183.

In Massachusetts and in Maryland the vendee has his option to retain and use the property and recoup, or sue on his warranty; or he may return it, rescind and sue for the consideration. *Dorr v. Fisher*, 1 Cush. 271; *Bryant v. Isling*, 13 Gray, 607; *Hyatt v. Bayle* 5 Gill & J. 121; *Franklin v. Long*, 7 id. 407; *Butler v. Blake*, 2 Har & J. 350.

In addition to the mere contract of sale, in an executory as well as on a sale *in presenti*, a vendor may warrant that the article shall have certain qualities. This agreement to warrant, in an executory contract of sale, is just as obligatory as a warranty on a present sale and delivery of goods. Is there any reason why the vendee, in such

executory contract of sale, may not rely upon that warranty to the same extent as upon a warranty in a present sale and delivery of property?

Had this syrup been all present when purchased, and the plaintiffs (the purchasers) given it all reasonable examination, without any actual trial, there could have been no legal objection to the defendants' warranty, that it would "not crystalize, or the sugar fall down," in its use.

Upon such a warranty the plaintiffs might have used the syrup without returning it, though found to be defective, and relied upon their warranty. This is well-settled law.

Why might they not likewise rely upon a like warranty in this executory contract?

I confess myself unable to see any controlling reason for a legal difference.

In a present sale with warranty it is expected, of course, that the vendor incurs the peril of defects being developed, in the property warranted, after its delivery to the purchaser. He warrants against that. He does precisely the same upon a warranty in an executory contract.

If it be dangerous to allow this defect to be discovered by the purchaser in the one case, without any return of the property, it is no more so in the other.

I see no reason why the same rights and remedies should not attach to a warranty in an executory as in a present sale, and no greater. The purchaser in an executory sale could not rely upon a warranty as to open, plainly-apparent defects any more than he could in a sale *in presenti*.

The appellant greatly relies upon the *nisi prius* case of *Hopkins v. Appleby*, 1 Stark. 388, tried before Lord ELLENBOROUGH, which was an action for goods sold and delivered, warranted to be of the best quality Spanish barilla and salt barilla. The defendant had consumed the article purchased in eight successive boilings, without giving notice of its defect or offering to return it; and he attempted to show that the quality could not be ascertained by mere inspection without actual experiment. Proof to the reverse of this was also given. The court held that he ought to have given notice of the defect in an early stage, so that the vendor might have sent there and ascertained the cause of the failure; and he disallowed the claim.

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That case has not been followed in the English courts. It is distinctly overruled in *Poulton v. Lattimore*, 9 Bar. & Cr. 259. There the buyer neither returned the seed bought nor gave any notice of its defect; but as there was an express warranty, the defects, by the breach thereof, were allowed to defeat the action for the price. This was in 1829.

Nor does it seem to have been the law of England prior to that decision. *Fielder v. Starkin*, 1 H. Bl. 17; and see Story on Sales, § 405, and cases there cited; also § 422, and note 2, and cases cited.

The counsel also insists that the cases of *Reed v. Randall*, 29 N. Y., 358, *McCormick v. Dawkins*, 55 id. 265, and cases there referred to, sustain this nonsuit. Neither was a case of warranty; and each one that speaks upon the subject expressly excepts the rule there laid down from a case of warranty as inapplicable.

In *Neaffie v. Hart*, 4 Lans. 4, there was claimed to have been an implied warranty. The court held that it was not taken out of the rule of the above cases.

In my opinion, where there is an express warranty the purchaser, whether in an executed or an executory sale, is not bound to return the property upon discovering the breach, even if he had the right to do so.

See the cases as to the right to return property purchased upon warranty, before cited; also those from Massachusetts and from Maryland; also *Messenger v. Pratt*, 3 Lans. 234. All agree that he is not bound to return property warranted upon discovering the breach. *Reed v. Randall*, 29 N. Y. 358, would have been decided the other way had there been an express warranty as to the quality of the tobacco. The court held there was no warranty, and that was the ground of the judgment.

Foot v. Bentley, 44 N. Y. 166, substantially decides this case. The action in respect to the warranty was held to lie, though the tea was not returned when its defects were discovered; but the judgment was reversed upon another ground. *Muller v. Eno*, 14 N. Y. 597.

The maintenance of this action does not at all conflict with *Hopkins v. Appleby*, *supra*.

Here notice was given of the defects in the syrup at an early stage, and the defendants promised to attend to it. They also apparently acquiesced in the plaintiffs' use of it, virtually promising to make it right if it did not prove to be sound rock.

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syrup. It would scarcely be just now to allow the defendants to take advantage of the non-return of the syrup under such circumstances.

Of course, there is danger of fraud and false claims, even where there is an express warranty, when notice is not early given of the defect. It leads the buyer into temptation. Hence, juries should listen to such claims (never presented when their falsity could have been ascertained) with great caution. The proof thereof should be more clear than if the buyer had acted with the frankness of an honest man, willing to allow his claims to be tested. This is so declared by courts, while the rule is maintained as to an express warranty as above stated.

The order of the general term granting a new trial is, therefore, affirmed, and judgment absolute given for the plaintiffs.

GROVER, FOLGER and RAPALLO, JJ., concur.

CHURCH, Ch. J., ALLEN and ANDREWS, JJ., dissent.

Order affirmed, and judgment accordingly.

WARNER V. THE NEW YORK CENTRAL RAILROAD COMPANY,
appellant.

(88 N. Y. 487.)

Verdict — right of jury to alter.

A jury, having agreed upon a verdict, reduced it to writing, sealed it, and separated. When produced in court, the next morning, it was for the plaintiff, for \$6,000, and was entered upon the minutes of the court. On the polling of the jury, they failed to agree, and were directed by the court to retire to their room. The jury, having retired, returned for instructions as to whether they could increase their verdict. Being instructed that they might decide upon any verdict to which they all agreed, they brought in a verdict for the plaintiff for \$7,000. *Held*, no error. Until the polling of the jury takes place, and the assent of the jurors, either express or tacit, is given to the verdict, and the jury is dismissed, and has become no more a jury in the case, the verdict is, within certain limits, in the power of the jury, and, to a certain extent, within the direction of the court.

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APPEAL from a judgment of the supreme court, at a general term in the fourth department, affirming a judgment in favor of the plaintiff, entered upon a verdict.

The action was brought to recover damages for injuries sustained by the plaintiff in consequence of the negligence of the defendant at a railroad crossing. While the plaintiff was traveling upon the highway his carriage was struck by a train upon the defendant's road, and he was thrown out and injured.

The principal question was, whether the verdict was properly rendered.

The facts on that subject appear in the opinion.

A. P. Laning, for appellant. The verdict was not defective in form, and having been rendered in open court, and entered upon the records, was final. *Walters v. Jenkins*, 16 Serg. & R. 414. To alter or set aside such a verdict is not within the discretion of the court or the power of the jury. 3 Gra. & W. on New Trials, 1404. The jury having separated, after agreeing upon and sealing a verdict, could not afterward meet and change it. *Oliver v. Trustees, etc.*, 5 Cow. 283; *Horton v. Horton*, 2 id. 589; 2 Gra. & W. on New Trials, 550; *Sutliff v. Gilbert*, 8 Ohio, 405. After the bringing in and reading of the sealed verdict the jury ought not to have been polled. *Root v. Sherwood*, 6 Johns. 68; *Blackley v. Sheldon*, 7 id. 33.

J. H. Martindale, for respondent. The verdict was properly rendered. 2 Dunl. Pr. 651; 7 Johns. 32; 2 Chit. 268; 25 Iowa, 216; Cro. Eliz. 779; Dyer. 204 b; 14 Ind. 142; 16 Serg. & R. 414.

FOLGER, J. The defendant's motion that the court direct the jury to find a verdict for the defendant was properly denied.

There was a conflict in the testimony whether or not the whistle was blown at all, or the bell rung, over the distance from the crossing, prescribed by the statute.

Both the plaintiff and his son testified positively in the negative, and their testimony had some support from that of Mrs. Smalley to the same effect; and that there was no bell rung, from that of the witness Hinckey.

The engineer and fireman both testified positively in the affirmative as to the ringing of the bell over the requisite distance, and as to the blowing of the whistle, and their testimony had some support from that of Hinckey, as to the blowing of the whistle.

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But which of these classes of witnesses was to be believed; how much the circumstances of the accident added to or detracted from their testimony; how much the reasons given by each for certainty of recollection strengthened or weakened it; these considerations were for the jury alone.

There was not a case presented in which it was for the court to say that the evidence was so clear, that as a legal conclusion there was not shown to be negligence on the part of the defendant, or that there was shown to be contributory negligence on the part of the plaintiff. If the witnesses of the plaintiff were to be believed, in preference to those of the defendant, then there was negligence on the part of the defendant, without contributory negligence on the part of the plaintiff. The determination of that question was peculiarly for the jury. It was fairly submitted to the jury by the charge of the court. It was not error so to do. *Labar v. Koplin*, 4 N. Y. 547.

The case of *Fordham v. Smith*, 46 N. Y. 683, cited by the defendant, is plainly distinguishable from this.

The case was delivered to the jury, late at night, with permission to bring in a sealed verdict in the morning if before that time one had been agreed upon. The jury did agree upon a verdict, reduced it to writing, sealed it, and separated. When it was produced in court on the next day, it was for the plaintiff for \$6,000. It was so entered (as the appeal book states it), "on the *record* of the court." But the foreman of the jury explained that the verdict should bear interest from the date of the former judgment. To this the defendant objected. The plaintiff then polled the jury; and they not agreeing were directed by the court to retire to their room; to which direction the defendant excepted. The jury afterward came into court for instructions, asking if they could increase the damages above \$6,000, if they did not add the interest. The court directed them that they had not as yet agreed upon any verdict which was conclusive, and that they might decide upon any verdict in the case to which they all agreed; and directed them again to retire to their room. To this the defendant excepted. The jury afterward brought in a verdict for the plaintiff for \$7,000.

Upon this state of the facts, the defendant insists that there was error. There is no doubt that, at this day, it is not erroneous to permit the jury to separate from time to time during the progress of the trial, and before the case has been finally submitted to them

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nor to permit them, when the parties assent and circumstances require it, to agree to a verdict, to reduce it to writing, to sign it, to seal it, to separate, to re-assemble themselves together, and to bring the sealed verdict into court at the opening thereof next thereafter

Nor is there any doubt of the right of either party to poll the jury, on the rendition of a verdict by the foreman, at any time before it is recorded (*Fox v. Smith*, 3 Cow. 23; *People v. Goodwin*, 18 Johns. 188); and this, although the verdict has been a sealed one, and the jury have separated before bringing it in; unless the right to poll has been expressly waived. *Bunn v. Hoyt*, 3 Johns. 255; 3 Cow., *supra*; *Jackson v. Hawks*, 2 Wend. 619; *Root v. Sherwood*, 6 Johns. 68; *Labar v. Koplin*, 4 N. Y., *supra*.

There is no doubt but that a jury after giving in a verdict may, before it is recorded, be sent back to reconsider it; not only to correct a mistake in form, or to make that plain which was obscure, but to alter it in substance, if they so determine and agree. *Blackley v. Sheldon*, 7 Johns. 32; *Goodwin v. Appleton*, 22 Me. (9 Shepley) 453; *Sutliff v. Gilbert*, 8 Ohio (Hammond), 405; *Wolfran v. Eyster*, 7 Watts, 38.

And where a jury has been authorized to bring in a sealed verdict, and has found it, put it in writing, sealed it, has separated, has the next morning come together in court and given it in; if the verdict be defective, the court may direct them to retire again and reconsider it. *Tyrrell v. Lockhart*, 3 Blackf. 136; 8 Ohio, *supra*; *Wolfran v. Eyster*, 7 Watts, *supra*.

And a witness may be re-examined before them, or the testimony as taken in manuscript read to them; or further instruction given to them by the court on some point of law not before made clear, or not before raised. *Henlow v. Leonard*, 7 Johns. 200.

It will be observed that in the language above used, taken from the decisions in some of the cases cited, the expression occurs, "before the verdict is *recorded*;" and it will be noticed that the appeal book in this case states that the sealed verdict brought in by the jury "was entered *on the record* of the court."

We are aware, however, that all that took place which we are now considering was at *nisi prius*; that the court which tried and disposed for the occasion of this case was a circuit court for the trial of issues of fact; and that the only record which it had, in which its clerk could make entries, was a book of rough minutes, into which was reduced in writing, in a comparatively hasty and tem-

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porary form, the different events of the trial in their order; thereafter, on the close and adjournment of the court, to become, by transcription into a more permanent form, a part of the records of the clerk's office of the county in which the trial was had, and so a part of the records of the supreme court of the State of New York. The clerk's book of rough minutes, kept by him on his desk at circuit, was that which gathered and retained the material from which afterward the lasting record of the court was to be made, and doubtless was made.

We all know, from the often repetition of the scene before us, just what usually takes place on the rendition of a verdict of a jury, be it oral, or in writing as a sealed verdict. It is uttered by the foreman of the jury, or read by the clerk from the paper handed in by the jury. It is then entered upon the minutes. The clerk then calls upon the jury to listen to their verdict as it has been *recorded* by the court. Perhaps the more technically accurate phrase would be "entered in the minutes." But that is not the end. It is not yet finished and perfected. The clerk still further puts the query: "Gentlemen of the jury, is that your verdict?" And if there is no dissent made, he concludes: "So say you all." And acquiescence *tacit*, or by sound or sign following, and no question by the court or either party being made, the jury are discharged from the further consideration of that case. Then, the verdict becomes a fixed legal fact, and may not afterward be altered in form or substance by court or jury or officer. It may well be queried. Why, if the entering of the verdict in the minutes by the clerk is the consummation of the trial, should the jury be again by him called upon to listen to it as he has entered it, and to say that it is or that it is not their verdict. We have seen from the cases cited, that up to the last moment, all or any of the jury may dissent from the verdict as announced from the jury box in open court; and that either party may by a poll search the conscience and the will of each jurymen; and this interpellation of the clerk is the last solemn, formal act, challenging the attention of each member of the jury, on the instant before the verdict becomes irrevocable and unchangeable. Until that is made, and assent given, express or tacit, and the jury dismissed and become no more a jury in the case, the verdict within certain limits, not exceeded in this case, is within the power of the jury, and to a certain extent within the direction of the court.

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And so it is laid down in the text-books. See 3 Robinson's Cr. Prac. 268, as cited in Graham and Waterman on New Trials, 3d vol., p. 1408, note; 1 Chit. Cr. Law, 635, 636; 1 Bishop's Cr. Pro., § 829.

And so it is declared in the cases: In *Regina v. Vodden*, 22 Eng. Law & Eq. 596, on a trial of a prisoner for felony, a jurymen by mistake delivered the verdict as "not guilty," when the jury meant "guilty," which verdict of not guilty was entered by the clerk of the peace on his minutes, and by the chairman of the sessions in his note-book. The prisoner was thereupon discharged out of the dock. Others of the jury interfered and said the verdict was guilty. The prisoner was brought back into the dock, and the jury asked what their verdict was, and all twelve answered that they had been unanimous for a verdict of guilty. And a verdict of guilty was directed to be recorded, and the prisoner was sentenced. On review the conviction was sustained. PARKE, B., said that a verdict is not recorded until it is put upon parchment; and that recording the verdict means recording the verdict to which the jury have agreed. And POLLOCK, C. B., stated that the form used to be: "Gentlemen of the jury, listen to your verdict *while* the court records it. You say that the prisoner is not guilty; and that is the verdict of you all." And in *Rex v. Parkin*, 1 Moody's Crown Cas. Reserved, 45, it was held that the mere entry of the verdict by the clerk in his book does not necessarily constitute a final recording of it. See, also, *Rex v. Justices of Suffolk*, 5 Nev. & Man. 139; *Regina v. Meany*, 1 Leigh & C. 213, 214-216; S. C., 9 Cox's C. C. 231; *McGregg v. State*, 4 Blackf. 101; *Walters v. Jukins*, 16 Serg. & R. 414.

In *Ward v. Bailey*, 23 Me. (10 Shepley) 316, the jury had rendered a verdict, and "it had been received and entered on the docket." But on questioning the foreman, it appeared that the jury had misconceived the meaning of the terms used in their verdict. They were permitted to correct the mistake, and the minutes of the clerk were altered accordingly. And on review this was held to be no error.

The fact that the verdict has been announced, and has been, as announced, entered in the minutes of the clerk, is not that recording which makes the announcement and the clerical act the fixed and unalterable verdict of the jury.

The true rule is laid down in the opinion in 16 Serg. & R., *supra*, that after the verdict has been received and entered upon the min-

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utes, and the jury has been dismissed, they have not the power to be re-assembled and alter their verdict. And see *Sargent v. The State*, 11 Ohio (1 Stanton), 472.

Before they have been dismissed from their relation to the case as jurors in it, their power over their verdict remains, and their right to alter it so as to conform to their real and unanimous intention and purpose.

We perceive no error done at the circuit in the conduct of the court and jury.

It is evident, from the statement in the appeal book, that the jury, or some of them, meant to award to the plaintiff more than the sum of \$6,000, which was the whole amount mentioned in the sealed verdict. The foreman expressed this intention when he said that the verdict (the \$6,000) should bear interest from the date of the former judgment, which, as may be inferred from the charge, had been rendered in the case in favor of the plaintiff, and had been set aside and this new trial ordered. When the jury, on demand of the plaintiff, were polled, and were found not to then agree to the finding as contained in the sealed verdict, or as explained by the foreman, it was the duty of the court to send them to their room to reconsider, and agree if might be. It was the privilege of the jury to come again into court and ask instruction. The court committed no error in the fact of giving instruction, nor in the particular instruction given. There had been, as yet, no conclusive verdict rendered; they had still to agree on a verdict. The verdict to which they at the last agreed corresponded with the finding in the sealed paper, in that it was for damages for the plaintiff. It fell short of the amount which would have followed from adherence to the statement of the foreman. It was not, by far, so complete a variance as that of guilty instead of not guilty on an indictment for a felony, nor greater than in some other of the cases hereinbefore cited.

There is nothing to show that harm came to the defendant from all that transpired.

The judgment appealed from should be affirmed, with costs to the respondent.

All concur, CHURCH, Ch. J., not sitting

Judgment affirmed.

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FLANAGAN, plaintiff in error, v. THE PEOPLE, defendants in error.

(53 N. Y. 467.)

Criminal law — defense of insanity.

The test of responsibility for criminal acts, where unsoundness of mind is set up as a defense, is the capacity of the defendant to distinguish between right and wrong, at the time of and with respect to the act which is the subject of the inquiry.

ERROR to the supreme court to review a judgment of the general term, in the first department, affirming a judgment of the court of general sessions of New York, entered upon a conviction of the plaintiff in error, of the crime of murder in the second degree.

The plaintiff was indicted for murder in the first degree, in killing his wife. The defense was insanity.

William F. Kintzing, for plaintiff in error. Although one has understanding, yet if he has no will, he cannot commit a crime. 1 Hale's P. O. 14; 4 Black. Com. 21. The "right and wrong" test as to the contemplated act is not favored. Ray on Insanity; Whart. & Stille's Med. Jur.; Beck, Dean, Taylor, Med. Jur.; Brown's Med. Jur. of Insanity; *Rex v. Hadfield*, 27 How. St. Tr. 1282. The power of choosing right from wrong is as essential to legal responsibility as the mere capacity of distinguishing right from wrong. *Reg. v. Bleasdale*, 2 Car. & Kir. 765; *State v. Windsor*, 5 Harr. 512; *People v. Pine*, 2 Barb. 566; *Scott v. Com.*, 4 Metc. (Ky.) 227; *Hopps v. State*, 31 Ill. 385; *Fouts v. State*, 4 Greene (Iowa), 500; *Bilman's Case*, Whart. Cr. Law, 30; *Hopps v. State*, 31 Ill. 385; *Com. v. Shurlock*, Leg. Int. 1857, p. 33; *Smith v. Com.*, 1 Duval, 224; *Com. v. Freath*, 6 Am. L. Reg. 400.

B. K. Phelps, district attorney, for defendants in error. One who is conscious that an act is wrong at the time he is committing it, and that it is in violation of law, cannot properly be said to be insane. *Willis v. The People*, 32 N. Y. 715.

ANDREWS, J. The judge, among other things, charged the jury that, "to establish a defense on the ground of insanity, it must be

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clearly proven that, at the time of committing the act (the subject of the indictment), the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; and, if he did know it, that he did not know he was doing wrong;" and to this part of the charge the prisoner, by his counsel, excepted.

The part of the charge excepted to was in the language employed by TINDAL, C. J., in *McNaghten's Case*, 10 Clarke & Fin. 210, in the response of the English judges to the questions put to them by the house of lords as to what instructions should be given to the jury, on a trial of a prisoner charged with crime, when the insane delusion of the prisoner, at the time of the commission of the alleged act, was interposed as a defense.

All the judges, except one, concurred in the opinion of TINDAL, C. J., and the case is of the highest authority; and the rule declared in it has been adhered to by the English courts.

MAULE, J., gave a separate opinion, in which he declared that, to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as to render him incapable of knowing right from wrong.

In the case of *Freeman v. The People*, 4 Denio, 28, the language of TINDAL, C. J., in the *McNaghten Case*, was quoted and approved; and BEARDSLEY, J., said: "Where insanity is interposed as a defense to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time the act was done."

The rule was re-affirmed in the case of *Willis v. The People*, 32 N. Y. 717, and it must be regarded as the settled law of this State, that the test of responsibility for criminal acts, where unsoundness of mind is interposed as a defense, is the capacity of the defendant to distinguish between right and wrong, at the time of, and with respect to, the act which is the subject of the inquiry.

We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them; and that the absence of the former is consistent with the presence of the latter.

The argument proceeds upon the theory that there is a form of

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insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid.

Whatever medical or scientific authority there may be for this view it has not been accepted by courts of law.

The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it.

Indulgence in evil passions weakens the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime, and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. ROLFE, B., in *Rogers v. Allunt*, where, on the trial of an indictment for poisoning, the defendant was alleged to have acted under some moral influence which he could not resist, said: "Every crime was committed under an influence of such a description; and the object of the law was to compel people to control these influences."

The judge intended, by the proposition excepted to, as is apparent from the other parts of the charge, merely to instruct the jury as to the character and extent of mental unsoundness which, if proved, would shield from criminal responsibility; and it must have been so understood by the jury and by counsel; and to the rule thus propounded by the judge the exception was pointed. What was said as to the measure of proof of insanity was incidental and collateral to the main proposition; and if an inadvertent error in phraseology crept in, it did not mislead, and was not excepted to.

In *People v. McCann*, 16 N. Y. 58, it was held that it was error to charge the jury in a criminal case that the insanity of the prisoner must be proved beyond a reasonable doubt, to entitle him to an acquittal. This was the extent of the decision. The question was not in the case, whether the prisoner would be entitled to the benefit of a doubt upon the evidence introduced by him to establish the defense. What is said by the learned judges upon that subject is entitled to such weight as their character and learning and their arguments entitle it to. See *People v. Schryver*, 42 N. Y. 1.

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It is not necessary for us to consider the question in this case; but we prefer to leave it precisely where the cases cited leave it, an open question, so far as judicial authority in this State is concerned.

The exception considered is the only one presented or argued by counsel, and we are of the opinion that the judgment should be affirmed.

All concur; RAPALLO, J., in result.

Judgment affirmed.

THE PEOPLE *ex rel.* WASHINGTON, appellant, v. NICHOLS, comptroller, etc.

(52 N. Y. 473.)

*Certificate—majority of several persons empowered—when they may act—
“office or public trust.”*

A statute appropriated a specified sum to be paid to the relator for the purchase of certain relics of Gen. Washington, by the State, to be paid only upon the certificate of three persons named therein, that the relics were genuine, etc. *Held*, that a certificate signed by two of the persons named, which stated that the third met with them, but refused to join in the certificate, was sufficient.

Held, also, that the fact that one of the persons named in the act was, at the time, a judge of the court of appeals, and as such incapacitated from holding any other “office or public trust,” did not invalidate the certificate, or render his appointment void; it not being an office or public trust within the meaning of the constitution, art. 6, § 10.

APPEAL from an order of the supreme court, made at a general term in the third department, affirming an order made at a special term, denying an application for a peremptory mandamus against the respondent as comptroller of the State.

The appropriation bill of 1871 (Laws of 1871, chap. 715, p. 1581) contained the following provision:

“To Mrs. Lewis W. Washington, the sum of \$20,000 for purchase of certain relics of General George Washington, offered by her to the State, to be paid to her upon the certificate of Martin Grover, the chancellor of the university, and J. Carson Brevoort, that said relics are in their opinion genuine, and that it is desirable, in their

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judgment, that they should be placed in the museum of the State library."

The relics referred to were presented to the three persons named at a meeting attended by all. The following certificate was executed and delivered to the relator :

" NEW YORK STATE LIBRARY, }
" ALBANY, *June* 19, 1871. }

" On this day, and at this place, Martin Grover, the chancellor of the university (John V. L. Pruyn), and J. Carson Brevoort, named in the aforesaid act of the legislature, all met for the purpose and in the discharge of the duty thereby confided to them, and inspected and examined the relics of General George Washington, referred to in the said act of the legislature, a list of which is hereby appended with a statement of certain evidence in regard to the said relics ; and thereupon the said Martin Grover refused to sign or unite in any certificate such as is called for by the said act of the legislature. The other parties named, to wit : the chancellor of the university (John V. L. Pruyn), and the said J. Carson Brevoort, do, therefore, without the concurrence of their associate, hereby certify that the said relics of General George Washington, referred to in the said act of the legislature, are, in their opinion, genuine ; and that it is desirable, in their judgment, that they should be placed in the museum of the State library.

" JOHN V. L. PRUYN,
" *Chancellor of the University.*
" J. CARSON BREVOORT."

This certificate was presented to the comptroller, on behalf of the relator, an offer made to sell and transfer the relics to the State, for the sum named, and the comptroller's warrant for that amount upon the treasurer demanded. The comptroller refused to issue a warrant, solely upon the ground of the refusal of Judge GROVER to join in the certificate.

S. Hand, for appellant. The three persons named in the act having regularly met, the act of the majority was binding. *Grindley v. Barker*, 1 Bos. & P. 229 ; *Green v. Miller*, 6 Johns. 41 ; *Downing v. Rugar*, 21 Wend. 182 ; *Cruger v. Hudson River Railroad Co.*, 12 N. Y. 192 ; *Rex v. Beeston*, 3 T. R. 592, 594. The fact that they were not expressly constituted a board or tribunal makes no differ-

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ence. 12 N. Y. 192. The case is within the provisions of the Revised Statutes. 2 R. S. 555, § 27; Revisers' Notes, 5 Stats. at Large, 509; *Horton v. Garrison*, 23 Barb. 176; *People v. Supervisors of Chenango Co.*, 11 N. Y. 563. The clear language of a statute will not be restrained by its title. *Constantine v. Van Winkle*, 6 Hill, 177; *People v. McCann*, 16 N. Y. 58; *United States v. Palmer*, 3 Wheat. 610; *The Same v. Fisher*, 2 Cranch, 386.

John Ganson, for respondent. Neither the common-law rule nor the section of the Revised Statutes relative to the execution of a joint authority applies to this case. *People v. Williams*, 31 N. Y. 441; *Stewart v. Wallis*, 30 Barb. 344, 347. It was necessary to a valid execution of the power that all the persons named should concur in exercising it. *Green v. Miller*, 6 Johns. 39; *Ex parte Rogers*, 7 Cow. 526; *Gildersleeve v. Board of Education*, 17 Abb. 201, 211.

PECKHAM, J. Several objections are presented by the respondent's counsel to the granting of the mandamus prayed for, which I will consider in their order.

He insists first that "the State does not owe the relator \$20,000, and she had no right to demand a warrant for that sum until she had complied with a condition precedent, to wit, until she had procured the certificate of the three persons designated by the legislature," etc.

Procuring the certificate required by the statute is very clearly a condition precedent to any right to the money. If the relator has not obtained it, she has no right, and of course can demand no remedy.

In the second place, he insists that the certificate of two of three persons designated is not a compliance with the statute, neither at common law nor under the general act on that subject.

The statute making this appropriation is as follows:

"To Mrs. Lewis W. Washington \$20,000, or so much thereof as may be necessary for the purchase of certain relics of General George Washington, offered by her to the State, to be paid only upon the certificate of Martin Grover and the chancellor of the university, and J. Carson Brevoort; that the said relics are, in their opinion, genuine; and that it is desirable, in their judgment, that they should be placed in the museum of the State library."

In my judgment, by the well-settled rule at common law, this

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power would have been legally exercised by the signature of two of the three to the certificate when all three had assembled to pass upon the question.

The only answer specially urged against this rule is that it solely applies "to matters of public concern;" that "as to matters of private concern," as this is claimed to be, all must join to make a valid execution of the power.

Grindley v. Barker, 1 Bos. & Pul. 229, is in point as to the general rule.

EYRE, C. J., there said: "I think it is now pretty well established, that where a number of persons are intrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole."

In that case six persons had been appointed, pursuant to an act of parliament, as "searchers," to examine and determine whether tanned hides, etc., offered for sale in certain places, were properly dried, etc. Four condemned them, and the other two refused. *Held*, by the opinions of all the judges, that this must be considered as the condemnation of all six. See the cases there cited.

It is scarcely necessary to cite authorities, as the general doctrine is hardly denied.

Then is this a matter of private concern? We are all of opinion it is not. The cases referred to by the respondent cannot fail to establish his doctrine. They hold that arbitrators, to determine controversies between individuals, are engaged in matters of private concern. *Green v. Miller*, 6 Johns. 39. But where appraisers act between individuals and the State, it is matter of "public concern," and a majority act as the whole, when all have met. *Ex parte Rogers*, 7 Cow. 526, 529.

In the case at bar the legislature desired to purchase, upon certain terms, what they regarded as of interest and value to the public. It was a question between an individual and the State. This would seem, then, to be plainly matter of public concern. This certificate, therefore, would have been legally given at common law when signed by a majority. But, irrespective of the common law, the provision of the Revised Statutes, in my opinion, embraces this case. It enacts that "whenever any power, authority or duty is confided by law to three or more persons, and whenever three or more persons or officers are authorized or required by law to per-

form any act, such act may be done, and such power, authority or duty may be exercised and performed, by a majority of such persons or officers, upon a meeting of all the persons or officers authorized and empowered, unless special provision be otherwise made." 2 R. S. 555, § 27. The counsel insists that "provision is otherwise made" in the statute making this appropriation. He lays stress upon the repetition of the conjunction "and" in requiring the certificate of "M. Grover *and* the chancellor *and* J. C. Brevoort." That thus the legislature intended to say that the certificate of a majority should not be enough. No such intent can be drawn from this nice verbal criticism. If the peculiar construction of the sentence have any special meaning, it would rather seem that the word "and" was inserted after the name of "M. Grover" to prevent the inference, otherwise plausible, that M. Grover was the "chancellor." It is certainly a very strained construction to say that this supernumerary or superfluous "and" makes "the special provision otherwise" required to take this case out of the general rule declared in the statute, that a majority can well execute the act.

The counsel emphasizes the words, in "*their*" opinion and in "*their*" judgment in reference to the contents of the certificate, as making the "special provision otherwise," alluded to in the general act. There is no force in these words for the purpose claimed. The general rule is, let it be observed, that a power, authority or duty for three or more may be exercised by a majority, unless "special provision be otherwise made." The act in the appropriation here uses apt words, *and nothing more*, for authorizing the power. Like words, substantially, were used in the statute in *Grindley v. Barker*, and in *Ex parte Rogers, supra*; but they did not change the rule. It is difficult to conceive how any other words could have been used with more propriety, if they had for their sole purpose the granting of this power to the three persons generally, without any declaration as to the number required for its exercise.

Had the statute used the word "his," instead of "their," so that it should read, "to be paid only upon the certificate of M. Grover and the chancellor, and Brevoort, that said relics are, in 'his' opinion, genuine, and that it is desirable, in 'his' judgment, that they should be placed in the State library," it is plain that there would be more plausibility for believing that the act intended each one to give his opinion; and that it did not require or contemplate

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the uniting of all, or their joint certificate. The statute declaring a majority to be sufficient was intended to apply, as it says, to cases where authority is conferred upon three or more to do an act, without making "special provision" whether all shall be necessary, or a majority will be sufficient to its proper execution. That is this case. There is not a line or a word in this act of appropriation that states whether all shall join in the certificate in order to have the power properly exercised, or whether a majority shall be sufficient. In such case, a majority is sufficient, and the certificate by the majority is, in judgment of law, the certificate of the whole. The words, in "*their*" opinion and in "*their*" judgment, are apt and proper to describe the acts to be done by the three. What other word could be used in place of "their?" The act to be done is well and aptly described. The act authorizes these three gentlemen to do it. It does not specify, or assume to specify, how it shall be done, or whether the certificate of a majority shall or shall not be sufficient. In such case the act is express that the signature of a majority is sufficient. The certificate of a majority is "their" judgment—"their" opinion—as the act requires. Had the legislature intended otherwise, they would have said so in plain language; they would have given something more than this superfluous "and," upon which to base so large an inference.

If this declaratory statute does not apply to this case, human ingenuity can scarcely imagine one where it could be applicable.

These are all the objections presented by the respondent's counsel.

One of my brethren, however, intimates the opinion that he was a judge of this court and his appointment to this position was void; that it was a violation of the constitution, which prohibits a judge of this court from holding any other "office or public trust." Const., art. 6, § 10.

Clearly the judge must have changed his mind, and I agree with his first and better opinion. Had he supposed that this was an "office or public trust," of course he would not have assumed to act. He would not have attempted to "hold" another office. But he did act without any declared limitation or doubt. He acted in the matter when he met with his colleagues, examined the "relics," and refused to recommend their purchase quite as much as his colleagues, who expressed a different opinion and came to a different conclusion.

The strength of this objection is much diminished by the fact

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that the able counsel for the respondent, though in great need of aid, as the case shows, could see no force whatever in this ground of objection, and hence entirely omitted it in his points.

Office has been defined to be "an employment on behalf of the government in any station or public trust not merely transient, occasional or incidental." Per PLATT, J., *In the Matter of the oaths to be taken by Attorneys, etc.*, 20 Johns. 493. The court held that attorneys and counselors were not officers, within the meaning of the constitution of 1821, which ordained that no other oath, etc., should be required as a qualification for any office or public trust."

Burrill says: "The idea of an office clearly embraces the idea of tenure, duration, fees or emoluments, rights and powers, as well as that of duty," and he cites several authorities. He says the intrinsic meaning of the word is well expressed by the old English word "place," and the figurative terms "incumbent," "swearing in," "entering upon," "vacating," constantly applied to offices, have the same radical idea.

Either of these terms is entirely foreign to the exercise of the authority conferred upon these gentlemen. 2 Burrill's Law Dict. 766; see, also, *Sheboygan Co. v. Parker*, 3 Wall. 93; *Vaccari v. Maxwell*, 3 Blatchf. 368.

It is very plain that the doing of such an act, a single act like this, is not within the meaning of the constitutional prohibition against "holding" any "other" office or public trust.

As to the other objection of my learned brother, that this declaratory act (2 R. S. 555, § 27) has no application, because here no provision is made for a board, for a meeting of the three, which that act required, that in fact the separate certificate of each person would have been as valid as the joint certificate of all, the first answer is that that act is not confined to a "board," though all must meet to give validity under its provisions to the act of a majority. It contemplates the meeting of all, as this act does. *Second.* It is plain that this act of appropriation contemplates the meeting of all. The certificate of each one separately would not be "their" certificate; it would not be "their" opinion or "their" judgment. See *Ex parte Rogers, supra*, and note. Upon what conceivable ground the courts below refused this relief it is impossible to imagine. They gave no opinion, and the judge at special term gave the case so little consideration as to decide it upon the argu-

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ment. It was probably supposed that the cause would come here, and hence the application was formally denied.

The courts have nothing whatever to do with the policy or expediency of this act. Its validity being conceded, we discharge our duty when we declare its legal meaning.

The act having been complied with, the order of the supreme court should be reversed and the peremptory mandamus ordered to issue.

All concur except GROVER, J., dissenting.

Ordered accordingly.

SAVAGE v. THE HOWARD INSURANCE COMPANY, appellant.

(52 N. Y. 502.)

Insurance — transfer or change of title — who may enforce policy.

A policy of insurance contained a provision that if the property insured should be sold or transferred, or any change should take place in title or possession, without the consent of the insurers, the policy should be void. *Held*, that a sale and conveyance of the property, without consent, avoided the policy, although simultaneously therewith a mortgage was executed back by the purchaser for a part of the purchase-money.

Where the property was vested in a testamentary trustee, in trust for the heirs of the former owner, and such trustee, being authorized by the will to do so, insured the property for the benefit of the "heirs and representatives" of her testator, *held*, that the trustee, although not named in the policy, could enforce it for the benefit of the beneficiaries under the will.

APPEALS from judgments of the supreme court, at general term in the third department, affirming judgments in favor of the plaintiff, entered upon a trial at the circuit without a jury.

The actions were brought upon two policies of insurance, issued by the defendants respectively for \$1,000 each, on a grist-mill and machinery. The policies were issued to the "heirs and representatives of Andrew Kirk, deceased," and each contained the following provision, viz.: "If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of the company indorsed thereon, the policy shall be void."

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The original plaintiff was Marilla Kirk, executrix of the last will and testament of said Andrew Kirk, deceased, under which she was authorized, as executrix, to insure, sell and convey his property. In February, 1870, after the policies were issued, the said executrix sold the property insured to H. O. Arnold, without obtaining the consent of the insurers, and without notice to them, and did not assign the policies to the purchaser. The grist-mill was sold for \$8,000 in cash, Arnold giving back a mortgage for \$7,000, which is still unpaid. Arnold was in possession, under a lease from the executrix, before purchasing and when the policies were given, and continued in possession afterward. On the 1st of August, 1870, the mill was destroyed by fire, and due notice, with proof of loss, was given to each company.

Marilla Kirk resigned her office on the 29th of August, 1871, and the plaintiff was duly appointed trustee and administrator with the will annexed, and as such was substituted as plaintiff in each suit.

S. Hand, for appellants. There was such a change of title as made each policy void. *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, 394; *Edmands v. Mut. S. F. Ins. Co.*, 1 Allen, 311; *McEwan v. Western Ins. Co.*, 1 Mich. (N. P.) 118. The mortgage did not reconvey the title. *Southworth v. Van Pelt*, 3 Barb. 347; *Jackson v. Williard*, 4 Johns. 41.

John Gould, for respondents. The title passed back so soon to the plaintiff, by the mortgage, that the sale could render void the policies. *Tittmore v. Vermont Mut. Ins. Co.*, 20 Vt. 546; *Kitts v. Massasoit Ins. Co.*, 56 Barb. 177. The plaintiff retains an insurable interest in the property, as mortgagee, to the extent of his mortgage. *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. 257; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Howard v. Albany Ins. Co.*, 3 Denio. 301. A change of title which does not deprive the insured of an insurable interest will not make void the policy. *Lazarus v. Com. Ins. Co.*, 5 Pick. 76; *Strong v. Man. Ins. Co.*, 10 id. 40; *Stetson v. Mass. Mut. F. Ins. Co.*, 4 Mass. 330; *Kitts v. Massasoit Ins. Co.*, 56 Barb. 177; *Jackson v. Silvernail*, 15 Johns. 278; *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68.

ALLEN, J. The questions presented by these appeals resolve themselves into a single one as to the true construction of the policies of insurance. Contracts of insurance are construed so as to

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give effect to the intent of the parties as indicated by the language employed. They do not in any respect differ from other written instruments, but are interpreted by the same rules; and one cardinal rule of interpretation requires that words and phrases in contracts, as well as in statutes and other written instruments, shall be taken in their ordinary proper sense, unless they appear to have been used in a different sense. *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389.

The insurers and insured may agree upon the terms of the contract and make its validity or continuance depend upon any terms and conditions, lawful in themselves, which they may deem reasonable or proper; and whether reasonable or unreasonable is for them, not for the courts, to determine. The title of the insured to the property at risk, and the measure and extent of his interest, is, in the nature of things, a material subject of inquiry in the making of the contract. The insurers have a right to know to what extent the insured has the ability to protect, or interest in protecting, the property against the perils insured against, and whether other parties have insurable interests which may enable those interested to secure, in the aggregate, insurances in excess of the value of the property. The insurers certainly had the right to treat any change or alteration either of title or possession as material, and provide that such alteration or change should avoid the policy; and if the assured assented to the contract with condition and limitation, effect must be given to the condition according to its terms. *Davenport v. New England Ins. Co.*, 6 Cush. 340; *Edmands v. Mutual Safety F. Ins. Co.*, 1 Allen, 311. As well the insured as the insurers are interested in the faithful observance of the conditions of the contract. The premium demanded is essentially regulated by the conditions of the contract and the risk assumed, and if conditions deemed material by the insurers are disregarded by the insured or nullified by the courts, the insurers will be made to suffer in the increased cost of insurance, as all will be made to pay for absolute and extreme risks.

By the policies, "the heirs and representatives of A. Kirk, deceased," were insured against loss, etc. It is not disputed that they were, and are valid policies in favor of the plaintiff as testamentary trustee of the real estate of the deceased, in whom the title to the premises insured was vested at the time of the insurance. He held the title in trust for the heirs of the decedent, and is entitled

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to the benefit of the policy, in trust for the beneficiaries under the will, although he is not specifically named. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Herkimer v. Rice*, 27 id. 163.

Each of the insurances was upon the condition expressed in the body of the policy, that "if the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, etc., then and in every such case this policy shall be void." The word "property" was used here for the *corpus* of the thing insured, as distinguished from the interest of the insured in it; the thing owned, and which was capable of being sold or transferred, and of which possession could be had. The word was used as it is in the division of property into real or personal, to indicate the thing itself, and not the estate or interest in it. In other policies, other expressions, widely different from this, have been held to mean simply the insurable interest in the property or thing insured; as in *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68, the policy was to become void "in case of transfer or termination of the interest of the assured in the property insured," and it was held that, so long as an insurable interest remained, the policy was not avoided. An insurable interest may exist independent of the title to the property, and, in that case, as the property may be sold, but an insurable interest covered by the policy may remain. That case was decided upon the peculiar phraseology of the condition. The conditions before us are broader, and intended to provide against a transfer of title or change in the title or possession, irrespective of any insurable interest that might arise or remain upon the change of title. In other cases cited, the conditions of the policies have differed somewhat in words from that in *Hitchcock's* case, but were in substance the same; and in none of the cases upon which the respondent relies did the condition make void the policy upon a sale or transfer of the property itself.

The condition found in these policies has been held, whenever it has come before the courts, to prohibit the sale or transfer of the property; and a change of title has been held to work an avoidance of the policy. It is by no means a forfeiture or penalty, or in the nature of forfeiture. The parties have determined, by their agreement, the conditions of the liability and the extent of the obligations of the insurers, and they can only be held liable in accordance with

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the terms of the agreement, and within the condition of the obligation.

In *Tittlemore v. Vermont Mut. F. Ins. Co.*, 20 Vt. 546, the policy was to become void if the property should be alienated by sale or otherwise ; and while it was held that a conveyance and a simultaneous reconveyance with the right of the original owner to continue in possession was not an alienation within the condition, although the last deed was conditioned to be void on the payment of a fixed sum within a specified time, the court was of the opinion, that had the premises been conveyed, and a mortgage merely taken back for the purchase-money, it would have been an alienation avoiding the policy. There was no personal agreement by the grantor in the second deed to pay the moneys mentioned therein ; so that the transaction was but a conditional sale, optional with the vendee whether he would consummate it, and the vendor retained the possession. It was in substance and effect an executory agreement to sell in the future. *Van Deusen v. Charter Oak F. & M. Ins Co.*, 1 Rob. 55, was within the same principle. There was no absolute alienation or transfer of title and possession. In *Stetson v. Mass. Mut. F. Ins. Co.*, 4 Mass. 330, the court construed the policy as importing the continuance of the contract, notwithstanding the alienation of the premises to the extent of the insurable interest remaining. The policy gave the insured the liberty, upon an alienation, to surrender the policy or to transfer it.

The effect of a conveyance of the property and the taking back a mortgage for the consideration upon a policy conditioned to become void upon a sale or alienation of the property insured in whole or in part, was considered in *Abbott v. Hampden Mut. F. Ins. Co.*, 30 Me. 414, and it was adjudged that, to constitute an alienation which would avoid the policy, it was not necessary that there should be an absolute transfer of the whole or any distinct portion of the property. If there has been a disposition of any part of it in such form that any property has passed to another, the alienation has occurred. The title was regarded as having passed to another who had become the owner, entitled to the possession, and the vendee had but a lien for the purchase-money, which would never serve to restore the title, except upon a failure of the purchaser and mortgagor to perform the condition of the mortgage, and the latter could at any time discharge the lien by paying the mortgage debt.

While the interests of the owner in fee and the mortgagee are

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both insurable, and each may have independent insurances, each covering his own interest, the interests are entirely distinct, and the rights and obligations of the parties to the contract different. Had the plaintiff been insured as mortgagee, the insurer, upon payment of a loss, would be entitled to be subrogated to the rights of the mortgagee against the mortgagor. The distinction between an issue based on a denial of an insurable interest and the question whether there had been an alienation or change of title, was recognized in *Orrell v. Hampden F. Ins. Co.*, 13 Gray, 431. A change of title, valid as between the parties, was treated as a breach of the condition, but there no alienation was proved. A mortgage is not an alienation of the property mortgaged; but when the condition of the policy was that "all alienations and alterations in the ownership," etc., of the property should make void the policy, a mortgage was held to be an alteration of the ownership and to make void the insurance. *Edmands v. Mut. Safety F. Ins. Co.*, 1 Allen, 311. The court thought it material to the insurers to know who had title to or interest in the property insured. The question was directly before this court in *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, and it was there held, without dissent, following the current of authority, and giving the policy a fair and reasonable interpretation, that the policy providing it should be void upon "any change of title in the property insured," it became void by a transfer of the premises by the owner, although the interest of the assured, a mortgagee, was not changed subsequent to the date of the policy. When the insurance was to the owner of the property, loss, if any, payable to a mortgagee with a similar condition as in this case, an alienation of the property by the mortgagor was adjudged to make void the policy. *Grosvenor v. Atlantic F. Ins. Co. of Brooklyn*, 17 N. Y. 391.

The condition is not capable of two readings, and the courts have no right, under the pretense of interpretation, to nullify a material provision inserted for the reasonable protection of the insurers, and thus exercise a dispensing power in favor of the insured. It cannot be said that a conveyance of the fee, and the taking back a mortgage for the purchase-money, is not as well a sale or transfer as a change of title. It is sufficient to put an end to the policy that there has been a change in the title; and no one can say that a conveyance of the fee and substituting the interest of a mortgagee in the insured is not a substantial change in the title. But the sale or transfer of the property was complete and absolute, and the retaining a lien for

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the purchase-money, either in the form of a mortgage or otherwise, did not change the character or effect of the conveyance. The fact that, to preserve equities and exclude liens which might otherwise defeat purchase-money liens, courts regard a deed of conveyance and purchase-money mortgage as simultaneous, and the rights of the parties as if the title to the amount of the mortgage interest had never passed out of the *grantor*, do not aid in construing this contract, or tend to establish the claim of the respondent that there has been no transfer of the property.

Another clause in the policy adds force to the views expressed. It requires that if the interest of the assured in this property be any other than the entire, unconditional and sole ownership, it shall be so represented and so expressed in the policy. Had the plaintiff desired to be insured as mortgagee, he should have seen that the interest was truly expressed in the contract. Another clause, providing for the case of the sale and delivery of property insured, is only applicable by its very terms to personal property, and does not qualify or affect the condition which has been considered, and which controls in these actions.

The judgments must be reversed, and a new trial granted.

All concur, except PECKHAM, J., dissenting.

Judgments reversed.

RANDALL, executor, etc., v. ELWELL *et al.*, appellants.

(53 N. Y. 521.)

Railroads — rolling stock — personal property.

The rolling stock of a railroad company is personal property, and as such, liable to be seized and sold for the collection of a tax against the company (*See note, p. 751.*)

APPEAL from a judgment of the supreme court, at general term, in the second department, affirming a judgment entered upon a verdict in favor of the plaintiff.

The action was brought to recover possession of two horse railroad cars, formerly the property of the Metropolitan Railroad Company, and damages for the detention thereof. They were levied

upon to pay a tax assessed against the company, and on the sale were purchased by the plaintiff's testator. The defendants claimed title under the foreclosure of a mortgage given by the company upon its road, and a sale and purchase of the property at such sale.

The jury, under the direction of the court, found a verdict in favor of the plaintiff.

D. T. Walden, for appellants. The property was part of the rolling stock of the road, and in law a part of the realty. *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. 484; *Pennock v. Coe*, 23 How. (U. S.) 117; *Hoyle v. Platts. R. R.*, 51 Barb. 45, 61; *Minn. Co. v. St. Paul Co.*, 2 Wall. 664; *Voorhees v. McGinnis*, 48 N. Y. 278; *D'Encourt v. Gregory*, L. R., 3 Eq. 382, 396. The plaintiff acquired no title to the cars, as against the corporation, or its mortgagees, or the defendants. *Cumberland Coal Co. v. Sherman*, 30 Barb. 571; *Abbott v. Hard Rubber Co.*, 33 id. 578, 593; *Campbell v. Johnson*, 1 Sandf. Ch. 148, 157; *Colburn v. Morton*, 3 Keyes, 296; *Butts v. Wood*, 37 N. Y. 317; *Van Epps v. Van Epps*, 9 Paige, 238; *Torrey v. Bank of Orleans*, id. 649; *Fisk v. Saber*, 6 W. & S. 23; *Beuren v. Heath*, 1 Y. & C. 340; *Moore v. Moore*, 5 N. Y. 262; *Jewett v. Miller*, 10 id. 402; *Boerum v. Schenck*, 41 id. 182; *Butts v. Wood*, 40 id. 319; *Gardner v. Ogden*, 22 id. 341; *Bissell v. Pearce*, 28 id. 252; *Coleman v. Second Avenue R. R.*, 38 id. 201; *Richards v. N. H. Ins. Co.*, 43 N. H. 263; *Gt. L. R. R. v. Magney*, 25 Beav. 586; *Oldham v. Jones*, 5 B. Monr. 458. The cars having been placed upon the road, as part of its equipment, after the purchase, they were subject to the mortgage under which the defendants purchased. *Pierce v. Emery*, 32 N. H. 484; *Warren v. Bay State Iron Co.*, 97 Mass. 279; *Clay v. Owen*, 81 id. 522; *Franklin v. Moulton*, 5 Wis. 1, 6; *Fryatt v. Sullivan Co.*, 5 Hill. 116; S. C., 7 id. 529; *Lane v. King*, 8 Wend. 584; *Shepard v. Philbrick*, 2 Denio, 174; *Ex parte Belcher*, 4 Dea. & C. 703; *Walmesly v. Milne*, 7 C. & B. (N. S.) 115; 48 N. Y. 284; 4 Alb. L. J. 304. While the cars were on the road, they were a part of it, and the defendants held possession thereof as a part of it, and the plaintiff could not claim the property. *Southworth v. Isham*, 3 Sandf. 448; *Langstaffe v. Meegoe*, 2 Ad. & El. 167; 6 C. B. (N. S.) 708; *Winn v. Inglesby*, 5 B. & A. 625; *Horn v. Baker*, 9 East, 215.

H. Sheldon, for respondent. The mortgaging of the cars did not protect them from being seized and sold under the collector's war-

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rant. 1 R. S. (4th ed.) 724, § 7. The company ratified the sale of the cars to Randall, and his title to them, by hiring the cars in question of him. *Boerum v. Schenck*, 41 N. Y. 182.

GROVER, J. The only objection to the validity of the assessment of the railroad company by the assessors, to the levying of the tax, the regularity of the sale by the collector, and the purchase by the plaintiff, was that made upon the motion for a nonsuit, which was that the plaintiff had failed to show a title to the cars in question. This was too general to call upon the court to consider and determine any of the defects now insisted upon by the counsel. The counsel is mistaken in supposing that the evidence proved that the plaintiff was a director of the company at the time of the purchase by him, or that the evidence was such as to render that a proper question for the consideration of the jury if that fact was material. The plaintiff, in substance, testified that he thought he was not a director; that he had been two or three years before that time; had then gone to California, and, for the year preceding the purchase, had not acted as a director at all; and believed he had not been elected as such. It was admitted by the plaintiff's counsel that the company, in its report to the State engineer for the year in which the cars were purchased by the plaintiff, stated that the plaintiff was a director. This report was not evidence against the plaintiff. It did not appear that he had had any thing to do with it, or knew any thing about it. The question whether, had the plaintiff been a director at the time of his purchase, it would have any and what effect upon the title, did not arise and will not be considered. The conclusion of the judge upon the trial, that the testimony proved that the plaintiff purchased the cars for himself, and thereby acquired title thereto, was correct. There was no conflicting evidence as to these facts. There was a conflict as to the value of the cars, and of their use while detained by the defendants. The counsel for the respondent states, in his points, that the parties finally agreed upon these facts, and refers to the folio that he claims shows it, which, upon examination, I think hardly sustains the counsel; but as the judge, in his direction to the jury to find a verdict for the plaintiff, fixed the specific sums which were to be found as the value of the cars, and of their use while detained by the defendants, and as no specific objection was made to either of the sums so fixed by the defendants' counsel, or any point made in this court founded thereon, I shall assume that such agreement was made.

The only remaining question is, whether the cars were the personal property of the company against which the tax was levied, or a part of its real estate. If the former, no question can be made but that the collector had the right to levy on and sell them for the purpose of collecting the tax ; being at the time in possession of the company, against which the tax warrant was issued, irrespective of the lien or title of any other person by mortgage or otherwise. 1 R. S. 378, § 2. If the cars were a part of the real estate, it is equally clear that the collector had no right to levy upon or sell them ; and that the plaintiff, by his purchase at such sale, acquired no title thereto, as a collector of taxes has no power to sell real estate. The question is, whether the rolling stock of a railroad company is real or personal property. It is obvious that the mode of propelling the cars, whether by steam, horse or any other power, can have no bearing upon the question. The question does not at all depend upon the length of the road, or whether the road of one company connects with that of others of the same gauge, and the companies so connecting, in the transaction of their business, are in the habit of running the cars of each over all the roads so connecting (as is often done), or whether the road has no connections, and, consequently, in the transaction of its business, its cars do not run beyond its own track. I think no one would claim that a car of the New York Central, which, in the course of business, had been run to Chicago, was part of its real estate while there ; and, if not such, I can discover no principle upon which the character of the property should be changed when it reached the Central track upon its return trip to New York. It must be borne in mind that the defendants in this case can claim no equity upon the ground that they acquired title by purchase upon the foreclosure of a mortgage given to secure the bonds of the company, as the collector's warrant overrides all equities of third persons in the property. The question is presented, free from embarrassment, whether cars, while owned and used by the company upon its track, were real estate or personal property. My conclusion is that they were personal property, and, as such, liable to be seized and sold for the collection of a tax against the company. The reasons upon which this conclusion is based will be found in *Stevens et al. v. The Buffalo and New York City Railroad Co.*, 31 Barb. 590, and in *Beardsley et al. v. The Ontario Bank et al.*, id. 619, and the authorities cited and reviewed ; and a repetition here is unnecessary. The reasons and authorities

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for holding that the cars were real estate will be found clearly and ably set forth in *The Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barb. 485.

The judgment appealed from must be affirmed, with costs.

All concur.

Judgment affirmed.

NOTE.—In some recent cases, by a rather artificial rule of construction, the rolling-stock of railroads has been held to be fixtures, so as to pass under a mortgage of the realty. *Palmer v. Forbes*, 23 Ill. 800; *Pennock v. Coe*, 23 How. 117; *Strickland v. Parker*, 54 Me. 263; *Titus v. Mabee*, 25 Ill. 257; *Farmers' Loan, etc., Co. v. Hendrickson*, 25 Barb. 485; *Farmers' Loan, etc., Co. v. Commercial Bank*, 11 Wis. 207; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 644; *Phillips v. Winslow*, 18 B. Monr. 431.—REP.

IN THE MATTER OF THE WILL OF FOX, DECEASED.

(53 N. Y. 530.)

Under a statute providing that lands may be devised "to every person capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise," *held*, that a devise to the government of the United States was void.

Where no express power is given to executors to sell lands, a power will not be implied from the mere charge of debts upon the lands.

APPEAL by the United States from a judgment of the supreme court, at general term in the first department, affirming a decree of the surrogate of the county of New York, refusing to admit the will of Charles Fox to probate, as a will of real estate. S. C., 63 Barb. 157.

The clause in the will, the validity of which was the principal question in the case was as follows: *First*. After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To the government of the United States, at Washington, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States.

The surrogate held that the devise of the real estate was invalid. and admitted the will to probate as a will of personal estate only.

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Edwards Pierrepont, for appellants. The United States, by right of sovereign power, may take any property to which they may be entitled, without regard to any technicalities of legislation. *United States v. Tingey*, 5 Pet. 542; *United States v. Brady*, 10 id. 560; *United States v. Lynn*, 15 id. 311. Under the statute of wills (2 R. S. 57), the United States are capable of taking real estate by devise. *United States v. Hewes*, Grubbe (Penn.), 307; *United States v. Davis*, 3 McLean, 483; *Lindsay v. Miller*, 6 Pet. 666; *United States v. Hoar*, 2 Mason, 211; *People v. Gilbert*, 18 Johns. 227; 2 Kent's Com. 276; *Am. Ins. Co. v. Canter*, 1 Pet. 546; 33 N. Y. 107; *Wicker v. Hume*, 7 Clark, H. of L. R. 155. A lawful intent in the testator will be presumed, if the language will fairly admit of a lawful purpose. *Port v. Howe*, 33 N. Y. 593; *Larry v. Larry*, id. 101; *Williams v. Williams*, 8 id. 525. The United States can take, directly by gift, grant or devise, property for governmental use or benefit. *Burrill v. Boardman*, 43 N. Y. 263.

James Flynn, for respondents.

ANDREWS, J. The right of the United States to acquire and hold lands within a State, as incident to the execution of certain powers conferred upon congress by the constitution, has been exercised from the foundation of the government, and has not been questioned or denied.

It is essential that this right should inhere in the general government. The constitution, among other powers, vests in congress the power to regulate commerce, to declare war, to levy and collect taxes, to establish post-offices and to constitute inferior courts.

In executing these powers, it may take and hold lands for the erection of light-houses, forts, custom-houses, post-offices and court-houses, and this State has been ready at all times to aid the general government, by assenting to the exercise by the latter of exclusive power of legislation over lands therein acquired for these purposes.

The mode in which congress shall acquire lands within a State required for public uses is not prescribed by the constitution. It may acquire title, doubtless, by voluntary conveyance from the owner, in any manner authorized by the law of the State in which the lands are situated, or it may take them, by the exertion of the power of eminent domain, upon making compensation to the owner. *Reddall v. Bryan*, 14 Md. 444; Story on Const., § 1141; Cooley on

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Const. Law, 525. But it does not follow from the concession that congress may take lands within a State for necessary public uses, that the United States has power, under the constitution, to take by devise. It was held by this court in *Levy v. Levy*, 33 N. Y. 99, that it had no power to take lands by devise in trust for a charity.

It is not necessary in this case to decide whether the United States could, with the consent of a State, accept a devise of lands made to it directly, and unaccompanied by any trust.

In view of the origin and nature of the power to devise lands; of the right of each sovereignty to determine the limitations under which this power shall be exercised, and of our statute upon the subject, the devise to the United States in the will in question cannot be sustained.

Statutes of wills are enabling acts. Prior to the statutes 32 Henry VIII, chap. 1, and 35 Henry VIII, chap. 5, there was in general no power at common law to devise lands. It was a part of the feudal policy that lands could not be alienated without the consent of the lord, and the power to devise lands was opposed to this policy. If permitted, it would have deprived the lord of many of the incidents and profits of feudal tenure.

The statutes referred to were not restrictive of antecedent rights, but conferred a limited power to devise. They permitted all persons, except *feme covert*s, infants, idiots and persons of non-sane memory, "having a sole estate in fee simple of any manors, etc., to give, dispose, will or devise to any person or persons, except bodies politic or corporate."

The English statute of wills became a part of the law of this State upon the adoption of the constitution of 1777.

It was substantially re-enacted by statutes passed in 1787 and in 1813. 1 Greenl. Laws, 387; 1 R. L. 364. And at the revision in 1830, the language was changed so as to provide that a testator may devise his lands "to every person capable by law of holding real estate, but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise." 2 Rev. Stat. 57, § 3. The validity of the devise to the United States in the will in question is to be tested by this statute. It is a settled principle of the common law, that the *lex rei sitæ* governs in respect to the modes of transfer of real property and the capacity to make and receive them, and the validity of devises of lands is regulated and controlled by the local law; and the law of

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any other jurisdiction or sovereignty upon the subject, in opposition to the law of the place, is nugatory.

There can be no pretense that the States have surrendered to the general government control over this subject. No such claim has been asserted; and jurisdiction over testamentary dispositions of lands within a State by the general government is in no way an essential or appropriate incident to the power to take lands for public uses.

It was held in *White v. Howard*, 46 N. Y. 144, that the corporations referred to in our statute of wills are those created by and existing under the laws of this State; and a devise to a foreign corporation of lands in this State was held to be void, although the corporation was authorized by its charter to take by devise. It must be maintained, therefore, to sustain the devise in question, that the United States is a person, within the purview of the statute. The word "person," when used in a statute, will, unless the meaning is restricted by the context, be deemed to include corporations. SHAW, J., in *Commonwealth v. Phoenix Bank*, 11 Metc. 129; *School Directors v. Carlisle Bank*, 8 Watts, 289; *United States v. Amedy*, 11 Wheat. 392; Ang. & Ames on Corporations, § 17.

They are artificial persons; bodies politic, possessing some of the attributes of natural persons, and are subject to many of the obligations and duties imposed by law upon individuals.

In the present statute of wills it was used in this comprehensive sense; otherwise, the prohibition against devises to corporations, not authorized by their charters or by statute to take by devise, would have been unnecessary.

The use of the word in this general sense in the former statute, which allowed a devise to be made "to any person or persons except bodies politic and corporate," is still more apparent. But no authority has been referred to showing that the word "person," when used in a statute, may, without further definition, be held to embrace a State or nation. Its meaning may be extended by express definition so as to include a government or sovereignty.

An example of this may be found in our statute relating to crimes (2 R. S. 703, § 35), which declares that when the word "person" is used in the chapter to designate the party whose property may be the subject of an offense, it shall be construed to include the United States, this State, or any State government or country which may lawfully own any property within this State.

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In construing a statute, words are to be taken in their ordinary sense, unless, from a consideration of the whole act, it appears that a different meaning was intended.

The word "person" does not, in its ordinary or legal signification, embrace a State or government; and there is no ground to justify such an extension of its meaning in construing the statute relating to devises.

The gift, in the will in question, to the United States cannot be sustained as a devise of land, for the reason that the testamentary capacity given by the statute extends only to devises to natural persons, and such corporations as are authorized by the law of the State to take by devise.

The point urged on behalf of the United States, that there was by the will an equitable conversion of the land into personalty, and that the gift may be treated as a bequest of the proceeds which should arise from the sale of the lands, cannot be sustained. There was no constructive conversion of the realty.

The plain intention of the testator was to devise the land, and not the proceeds, and that the United States should take as devisee of the land. He used apt words to charge the lands devised with the payment of debts.

The devise being "after payment of debts," was a charge of the debts upon the lands devised. *Lupton v. Lupton*, 2 Johns. Ch. 614.

They were not charged in exoneration of the personalty, and under our statute the lands devised would have been charged, in the hands of the devisee, with the debts, if no reference had been made to them in the will.

The only contingency upon which a sale of the lands could become necessary for the purposes of the will, would be in case the personal property should be insufficient to pay the debts of the testator.

It was uncertain whether a sale for that purpose would be required.

There was no direction in the will that the lands should be sold for the payment of debts. No express power was given to the executors to sell them; nor under our system of administering the property of decedents, for the payment of creditors, can such a power be implied from the mere charge of debts upon lands descended or devised.

In *Jones v. Hughes*, 6 Exch. 223, it was held, by the unanimous judgment of the court exchequer chamber, that there is no implied

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power in executors to sell lands, arising from a mere charge of the debts upon the land made by the will, and that in such case the remedy of creditors was in equity. This decision was not followed by the master of the rolls in *Robinson v. Lowater*, 17 Bea. 592, or by the lord justices in the same case on appeal. 5 DeG. M. & G. 271.

Sir E. SUGDEN (Sug. on Vend., 14th Eng. ed.) speaks of these latter decisions as contrary to the received opinion, and the law upon the point has since been settled by statute. 22 and 23 Vict., chap. 35.

The statute in this State has provided an ample remedy for creditors for the collection of their debts out of the real property of a decedent, and the implication of a power of sale in executors, from a simple charge of the debts upon the lands, is unnecessary and ought not to be indulged. But the mere power of sale, if it existed in the executors, would not work a constructive change of the property. To do this, the duty to sell must be imperative, and when there is no out and out conversion, and lands are charged only with the payment of debts, they retain their character of realty until actually converted. 2 Jar. 529; Story's Eq., §§ 790, 1224; *Bourne v. Bourne*, 2 Hare, 85; *Stagg v. Jackson*, 1 N. Y. 206; *Harris v. Clark*, 7 id. 242; *Savage v. Burnham*, 17 id. 561; *Clark v. Riddle*, 11 Serg. & R. 311.

The judgment of the general term should be affirmed, with costs.

All concur.

Judgment affirmed.

CASES
IN THE
SUPERIOR COURT
OF
DELAWARE.

DOE d. POTTS v. DOWDALL.

(8 Houst. 300.)

Estoppel — grantor and grantee.

M. made a deed purporting to convey land to which he had no title to defendant, with covenants of warranty against all persons claiming under him. Afterward M. acquired title to the land and mortgaged it to H. under whom plaintiff claimed. In ejectment, *held*, that plaintiff was estopped to say that M. was not seized at the time of the first conveyance and could therefore not recover.

THIS was an action of ejectment for a house and lot in the city of Wilmington, and case stated, argued at the May term, 1866. John Menough was seized in fee of the premises in question, and on the 10th day of September, 1849, by deed of himself and wife, conveyed them in fee to William Boyd, of Philadelphia, with covenants of warranty, and which was duly recorded at New Castle on the 19th of November following, and on the 26th day of March, 1850, John Menough and his wife, by deed of bargain and sale, conveyed all their estate, right, title, interest, property, claim and demand whatsoever in law or equity of, in, to or out of the same land and premises to Joseph Dowdall, the tenant in possession, in fee simple, with covenants of warranty that he, John Menough, was lawfully seized in fee thereof, that the said premises were free from incumbrance, and that he had good right to sell and convey

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the same to him, and that he and his heirs, executors and administrators, would and should warrant and defend the same to him, his heirs and assigns forever, against the lawful demands of all persons claiming or to claim the same or any part thereof by, from or under them or any of them, and which deed was also duly recorded at New Castle on the 5th of August following, and under which Dowdall went at once into the possession of the premises, and had ever since received the rents and profits of them. The deed to him also contained a recital that the premises were part of a larger parcel of land which Samuel Woolston and wife conveyed to John Menough, August 27th, 1847. On the 5th of April, 1851, William S. Boyd and Elizabeth his wife re-conveyed to John Menough the premises which Menough and wife conveyed to Boyd on the 19th of September, 1849 (it being the same lot of land which Menough and wife conveyed to Dowdall on the 26th of March, 1850), and the deed was entered for record on the 9th day of December, 1851. On the 7th day of June, 1853, John Menough and wife executed two mortgages, one for one thousand dollars, and the other for two thousand dollars, and thereby mortgaged two messuages and lots of ground, one of which lots was the same premises conveyed by the deed of William S. Boyd to John Menough, and the same which the said John Menough had heretofore conveyed to Joseph Dowdall, and the other of the said messuages and lots was subject to a prior mortgage, one of which mortgages was given to George W. Hawley and Thomas P. Hawley of Chester county, Pennsylvania, which was afterward assigned to Caleb Strode, and the other of the said mortgages was in favor of William Potts. These mortgages recited the title of the last of said premises as the same which William S. Boyd and wife by their deed of April 5th, 1851, had conveyed to the said John Menough. The interest on both of the mortgages was paid by John Menough until August and December, 1857, and at the November term, 1859, judgment was obtained on the *scire facias* issued upon the mortgage then held by Caleb Strode, against John Menough and wife, and upon a *levari facias* to the May term, 1860, the said premises were sold and William Potts, the lessor of the plaintiff, became the purchaser and holds the deed therefor, executed by Levi B. Moore, sheriff. The other messuage and lot of land mentioned in the said mortgages having been sold under a prior mortgage, there remained a surplus of money arising from the sale under the first mortgage out of which \$279.19 was applied to the

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one thousand dollar mortgage held by Caleb Strode, and \$558.33 was applied to the two thousand dollar mortgage held by William Potts. The purchase-money arising from the sale of the premises in dispute on the mortgage of Caleb Strode was only a nominal sum. Each and all of the deeds and mortgages herein referred to, to be considered and taken to be part and parcel of the case stated. The question was whether the plaintiff was entitled to recover the premises in question, mentioned in the demise laid in his declaration. If the court should be of that opinion, judgment to be entered generally for him; but if not, for the defendant.

G. B. Rodney, for plaintiff. At one time it was held in some of the States of the Union, and such was formerly the case in the State of New York, that any warranty in any kind of a deed would operate, in a case like the present, to estop the plaintiff from setting up a claim of title to the premises in dispute. *Jackson v. Murray*, 12 Johns. 201; *Jackson v. Wright*, 14 id. 193. But latter cases have settled it otherwise. There was no doubt a feoffment, or a fine, or a fine and recovery always had the effect to estop the party making it from setting up any after-acquired title in contravention of it, but that was owing entirely to the peculiar force and practical effect which the open and formal ceremony of livery of seizin always imparted to such conveyances. Such, however, was not the case with regard to our modern deeds of conveyance, such as a deed of bargain and sale, or of release, which existed only in grant, and were executed without any such formality. But where such a conveyance as he had just mentioned, contained a general warranty of title against all persons, it would operate to estop and conclude the grantor from setting up a subsequently acquired title or claim to the premises against it. 4 Kent's Com. 98; 1 Shep. Touch. 204; Perk. on The Laws of Eng. 30; Hob. 45; Co. Lit. 265 a. But where the warranty was special, and not general, which was the case here, it could not have the effect to conclude the grantor, and constituted no estoppel in such a case against him. *Comstock v. Smith*, 13 Pick. 116; *Blanchard v. Brooks*, 12 id. 47; *Jackson v. Bradford*, 4 Wend. 619; *Jackson v. Winslow*, 9 Cow. 1; *Jackson v. Hubble*, 1 id. 613; Rawle on Cov. for Tit. 402, 455; 22 E. U. L. 128; Smith's Lead. Cas. 30 Law Libr. 417.

Higgins, for defendant.

GILPIN, C. J. The modern doctrine of estoppel, resulting from the covenant of warranty, as at present recognized and enforced in the courts of this country, may be said to be mainly of American growth.

The ancient common-law doctrine of warranty finds its origin in the feudal constitution and tenures; and the obligation which they imposed was created without any express covenant to that effect between the lord of the fee and his vassal. By that constitution the lord was bound to protect and defend the fee, which his vassal had derived from him; and in case he failed to do so, and the vassal was evicted, the lord was bound to give him another feud of equal value as a recompense or satisfaction for the one which he had lost. And this obligation descended upon the heir of the grantor, so long as he had any lands from his ancestor, to answer the claim of the vassal.

And subsequently when a deed of feoffment accompanied the gift, the word of feoffment "*dedi*" was construed to imply a warranty of the land; and sometimes, though it is supposed but rarely, the deed contained an express warranty of the estate. It is to these several kinds of warranty, and the doctrine of estoppel growing out of them, that the learning to be found in Lord COKE's Institutes properly applies. Covenants for title, as they are called, were unknown in his day. Lord COKE died in the year 1634. And these covenants, five in number — of seizin, of right to convey, for quiet enjoyment, against incumbrances, and for further assurance, which were invented by Sir Orlando Bridgeman, during his practice, but after the death of Lord COKE, were probably introduced by him into use toward the close of the protectorate; for Sir Orlando Bridgeman came to the bar in 1632; was appointed by Charles II, on his restoration, chief justice of the common pleas in 1660, was made lord keeper of the great seal in 1667, and died in 1674. So that it is quite clear, those covenants for title, invented at a time of insecurity and revolutionary change, came into general use in the mother country in the latter half of the seventeenth century, and that in fact they very soon became, in a great measure, a substitute for the old modes and forms of warranty, whether express or implied, and were brought over to this country by our English ancestors. They also brought over with them another covenant of a mixed character analogous to the ancient express warranty, but more comprehensive in its scope, which, in practice, has become our great covenant for

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title. This is our covenant of warranty. Humphries on Real Property; Rawle on Covenants for Title.

It is not my purpose to enter into the many refinements and subtleties which confuse and obscure the old law of warranty, rebutter and estoppel; nor shall I attempt to explain or reconcile the conflicting decisions on the subject, either ancient or modern. Lord COKE in commenting on the 667th section of Litt. says: "It is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth, and Littleton's case here proveth this description." 2 Coke Litt. 352 *a*. Mr. Butler in his comments on this passage says, the reasons why estoppels are allowed seem to be these — "no man ought to allege any thing but the truth for his defense, and what he had alleged once is to be presumed true, and therefore he ought not to be contradicted." * * * * "That some evidence should be allowed of so high and conclusive a nature as to admit of no contradictory proof." Note to Coke Litt. 352 *a*; Rawle on Covenants for Title, 319. In other words, it is but reasonable that a man should be estopped by his own deed to aver or prove any thing contrary to that which he has once solemnly alleged under seal.

And, although this doctrine has often been denounced as odious, and declared to be unworthy of recognition by the courts, yet it would seem, when properly understood, to be founded upon such principles of morality and justice as commend themselves to our best conscience. Because its proper application only debars the averment of the truth, in a case where such an averment would convict the party of a previous falsehood, and where to permit it, would be to allow him to deny a previous affirmation, upon the faith of which other persons had been induced to deal with him. The very purpose and intent of the doctrine, when properly understood, is to prevent fraud and falsehood; and it only closes the mouth of a party, when to let him speak would be contrary to honesty and good conscience. Estoppels are said to be of two kinds — the one personal in its character, operating as a personal rebutter and preventing the grantor, and those claiming under him, from asserting title, or contradicting the intent and effect of his deed, which Lord COKE calls a "kind of estoppel;" the other, however, is of larger scope, for whilst it carries with it all the qualities and attributes of the former, it also possesses the additional function of operating an actual transfer of an after-acquired estate. "The interest when it

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accrues feeds the estoppels." *Doe v. Oliver et al.*, 5 M. & Ryl. 202; S. C., 2 Smith's Lead. Cas. 417; *Helps v. Hereford*, 2 Barn. & Ald. 242; Shep. Touch. 204, *margin*. According to the doctrine of the English cases the latter effect was confined to feoffments, fines, recoveries and leases. Neither can mere grants, releases or quit-claims be said to possess the high function of transferring an after-acquired interest. Nor, indeed, were conveyances under the statute of uses held to have this operation. But this doctrine, when applied to deeds of bargain and sale, must be confined to that description of conveyance strictly and properly so defined, that is, to naked deeds of bargain and sale. For it is well settled by numerous authorities that if it is manifest on the face of the conveyance, either by recital, admission, covenant, or in any other way, that the parties actually intended to convey and receive the identical estate and interest which is the subject-matter purporting to be conveyed by the instrument, they shall be held estopped from denying the operation of the deed according to its manifest intent. *Goodtitle v. Bailey*, Cowp. 597; *Bensley v. Burdon*, 2 Sim. & Stew. 524; *Marchant v. Errington*, 8 Scott, 210; *Annandale v. Harris*, 2 P. Wms. 432; *Sheely v. Wright*, Willes, 9; *Trevivan v. Lawrance*, 1 Salk. 276; *Penrose v. Griffith*, 4 Binn. 231; *Denn v. Cornell*, 3 Johns. Cas. 506; *Sinclair v. Jackson*, 8 Cow. 586; *Carver v. Astor*, 4 Pet. 83-86; *Root v. Crock*, 7 Barr, 380; *Kinsman v. Loomis*, 11 Ohio, 478; *Van Rensselaer v. Kearney*, 11 How. *Bensley v. Burdon* was a case of recital in the deed of the grantor, that he was entitled to a remainder in fee expectant on the determination of a life estate, when, in fact, he had no interest in the premises at the time, but afterward having acquired an estate for life in a part of them, he conveyed the same to the defendant, and it was held by the vice-chancellor, that the grantor having averred (by recital) in the deed that he was seized of a remainder in fee, he was estopped from setting up that he was not so seized at the time of the grant, and further, that the estoppel ran with the land and bound not only the grantor, but all claiming under him. This judgment was afterward affirmed by the lord chancellor, who put his decision on the ground that the *recital* of the interest of the grantor in the premises, was an averment of a particular fact by which the defendant was concluded. *Marchant v. Errington* was the case of a *recital*, and it recognizes the same principle, although the estoppel was held by Lord TINDALL not to apply, for the reason that there was no privity in estate between the plaintiff and

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defendant. *Jackson ex dem. Munroe v. Parkhurst et al.*, 9 Wend. 209, was a case of recital, and the decision accords with the cases just mentioned.

The doctrine that a solemn *recital or admission* under seal concludes both privies seems to be fully sustained by the cases of *Bowman v. Taylor*, 2 Ad. & Ell. 278; *Lainson v. Tremere*, 1 id. 792; *Hill v. Manchester & Salford Water-works Co.*, 2 Barn. & Adol. 544; *Inskeep v. Shields et al.*, 4 Harrington, 345; *Jefferson v. Howell*, 1 Hous. 183; *Van Rensselaer v. Kearney*, 11 How. 325, and the cases of *Bensley v. Burdon*; *Monroe v. Parkhurst et al.*, and *Marchant v. Errington*, above cited. In the case of *Fairbanks v. Williams*, 7 Greenl. 96, there was no covenant for title, properly so called, the covenant of the grantor being simply, that neither himself, his heirs or assigns would ever make any claim to the premises; and yet the court held that this covenant operated as an estoppel, not only upon the grantor, but upon all claiming under him, from setting up an after-acquired title to the premises against the grantor or those in privity with him.

I am aware that the case of *Fairbanks v. Williams* has been shaken, if not overruled, by *Pike v. Galvin*, 29 Me. 185; and yet upon principle, as well as authority, I think the former is the sounder decision of the two. That decision had been recognized as sound law in Maine and elsewhere for more than twenty years. It is in perfect harmony with principles well settled in the courts of other New England States. It is cited and approved in *White v. Patten*, 24 Pick. 324, in *Trull v. Eastman*, 3 Metc. 121, and in *Van Rensselaer v. Kearney*, 11 How. 297. Mr. Rawle, the learned author of the treatise on the law of covenants for title, in his note on the case of *Pike v. Galvin*, remarks that it is difficult to support the authority of this case upon the principles so well settled in New England. See, also, the dissenting opinion of WELLS, J., published in 30 Maine. In the case of *Trull v. Eastman*, the words of non-claim were substantially, if not literally, the same as those contained in *Fairbanks v. Williams*; and yet, the court held that they amounted to a covenant real, running with the land, and were, in effect, a warranty that the grantor would not, and that his heirs and assigns should not, thereafter claim the premises; and that, although the grantor or releasor had not then a present right, yet the subsequent acquisition of it would inure to the use of the grantee. And the learned judge who delivered the opinion of the court remarked,

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“there is nothing to the contrary in the case of *Comstock v. Smith*, 13 Pick. 116.” The case in 13 Pick 116, is materially different from this, being in effect against and *quit-claim* of all “right, title, claim and demand” in and to the premises, and not of the land itself, or any particular estate in the land; and, therefore, the warranty was held to be restricted in its scope, and to apply only to the estate and interest then vested in the grantor. The same general remarks apply with equal force to the case of *Blanchard v. Brooks*, 12 Pick. 67. That was a case in which the grantor bargained and sold all his *right, title and interest*, and the recitals show that in a part of the premises he had but a contingent remainder, so that the extent of the estate and interest which he had in the premises was disclosed by the recital contained in the deed, and it was thus manifest that the conveyance was fully satisfied by applying the warranty to the then vested interest.

And these cases, as well as others of their class, are clearly distinguishable from cases in which the grantor undertakes to convey the land itself, or the very estate which is the subject of the instrument of conveyance. It is certainly a matter of some difficulty to comprehend the wisdom of the distinction which is to be found in the books, between covenants and admissions, which, operating by way of personal *rebutter*, prevent the grantor and all others claiming under him, from setting up the after-acquired title — and covenants which operating by way of *estoppel* in the technical and absolute sense of that term, actually transfer the after-acquired title. This distinction, however, so far as concerns the case now in hand, seems to be of no practical importance, as the result, according to either theory, must be substantially the same. Because if it operates by way of personal rebutter, then the only person who has, as it were, a better title, is under such a legal disability as to preclude him from asserting his claim to the estate; and, in either case, the grantee, or person in whose favor the rebutter operates, is equally secured in his possession. But the safer doctrine, and that which, in our judgment, is fully sustained by the weight of the American authorities is, that the covenant of warranty operates as an estoppel in the absolute sense of that term, so as to transfer and pass the after-acquired estate. The authorities are full and conclusive on this point.

Where one who has no title conveys land with warranty, and afterward acquires title, and conveys to another, the second grantee is estopped to say that the grantor was not seized at the time of the

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first conveyance. And where both parties claim under the same person they are privies in estate, and cannot, as such, deny the title of the grantor at the time of the first conveyance; and the estoppel, working upon the estate, binds both parties and privies. In the language of the court in the case of *Douglass v. Scott*, "the obligation created by the estoppel, not only binds the parties making it, but all persons privy to him; the legal representatives of the party — those who stand in his situation by act of law — and all those who take his estate by contract stand in his stead, and subject to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate, it becomes a muniment of title, and all who afterward acquire, take it subject to the burden which the existence of the fact imposes on it." *Douglass v. Scott*, 5 Ohio, 198; *Hill v. West*, 8 id. 222; *Lawry v. Williams*, 1 Shep. 281; *Murphy v. Barnett*, 2 Murphey, 251, *White v. Patten*, 24 Pick. 324; *Green v. Clark*, 13 Vt. 158; *Massie v. Sebastian*, 4 Bibb, 436; *Ward v. Willard*, 18 N. H. 389; *Dudey v. Cadwell*, 19 Conn. 227; *Brown v. McCormick*, 6 Watts, 64; *McCall v. Coover*, 4 Watts & Serg. 161; *Root v. Crock*, 7 Barr, 380; *Shaw v. Galbraith*, id. 111; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 567; *French v. Spencer*, 21 How. 228. Now let us advert to the facts of the case in hand and see how far the principles just stated apply to them. Before doing so, however, it is but proper to remark that the case stated presents the case imperfectly and incorrectly. It is only by examining the terms of the deed itself, from Menough and wife to Dowdall, that we are enabled to arrive at a correct understanding of the case before us.

By the case, as stated, Menough and wife are represented as conveying all their "estate, right, title, interest, property, claim, and demand whatsoever" in the land, merely this and nothing more, which would seem to make the case very similar to that of *Comstock v. Smith*, and other cases of that class. But this is not so, for when we examine the deed of Menough and wife to Dowdall, which is referred to, and thus made a part of the case stated, we find that they therein grant and convey the *corpus* of the thing — the land itself — as well as the estate and interest in the land. In the first place their deed to Dowdall recited that by virtue of a certain indenture of bargain and sale executed by Samuel Woolston, the said John Menough "became lawfully seized in fee of and in a certain tract of land situate in the city of Wilmington, south side of Seventh and Madison streets, containing within its bounds seven thousand two hundred

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and ninety square feet, more or less." Then follows the granting part of the deed, in which the parties of the first part "grant, bargain, sell, alien, enfeoff, release, convey, and confirm unto the said party of the second part (Dowdall), and to his heirs and assigns, all that part of the above-mentioned and aforesaid property or *tract of land*, bounded and described as follows, to wit: beginning," etc., particularly describing the same by metes and bounds, "together with the buildings and improvements," etc., "and also, all the estate, right, title, interest, property, claim and demand whatsoever of them the said parties of the first part and their heirs." "To have and to hold the said *lot or tract of land* herein above described, with the buildings, improvements, hereditaments and premises," etc., unto the party of the second part, his heirs and assigns forever. Then comes the following covenant: "And the said John Menough, for himself, his heirs, executors and administrators, doth covenant with the said party of the second part, his heirs and assigns, that he is lawfully *seized in fee* of the aforesaid and conveyed premises, and that they are free from all incumbrances, and that he has good right to sell and convey the same to the said party of the second part as aforesaid, and that he will, and that his heirs, executors and administrators shall, warrant and defend the same to the said Joseph Dowdall, his heirs and assigns forever, against the lawful demands of all persons whomsoever, claiming, or to claim the same or any part thereof, by, from, or under them or any of them."

Now, as to the intention of the parties to the conveyance, did Menough intend to convey merely his right and title in the land, be the same much, or little, or nothing, as the case might be? Or did he not, rather, intend to convey the land itself, and the absolute estate and interest in the land, so as to vest the same in Dowdall in fee simple? Dowdall certainly expected to obtain the fee. So that the parties intended to convey and receive, reciprocally, the very land, estate, and interest, which the deed purported to convey. The grantor *recites* that he is seized *in fee*, he covenants that he is seized in fee, and he grants and conveys the land to Dowdall, in fee simple, by apt and sufficient words.

Now as to the warranty. It is said that the terms of the warranty in this case are not sufficiently comprehensive to estop the plaintiff, or to transfer the after-acquired title. It is said that all the cases cited from the books in which it has been held that the after-acquired title passed, are cases of general warranty, and that

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this is a special warranty. But how can this difference in the terms of the covenant affect the case before us. There seems to be no rule of law better settled in this country at the present day than that the estoppel working upon the estate binds both parties and *privies*. It is true the grantor does not covenant to warrant and defend against all persons, or against a stranger claiming by title paramount; but he does covenant to warrant and defend the conveyed premises against all persons claiming through or under him. William Potts, the plaintiff, claims as a purchaser at sheriff sale under a mortgage executed by Menough and wife to George W. and Thomas P. Hawley, subsequently to the conveyance to Dowdall. Standing, therefore, as he does, in the shoes of these mortgagees, he claims under Menough, and is a privy in estate. We are, therefore, of the opinion that he is estopped to deny the title of the defendant; and that Menough's after-acquired title passed to the defendant immediately upon the execution of the deed from William S. Boyd and wife. As the defendant has been in possession from the date of his deed, it is not material in this case to consider the effect of recording the several deeds referred to in the case stated.

Let judgment be entered in favor of the defendant.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

MILLER V. MAYOR, ETC., OF MOBILE.

(47 Ala. 168.)

Municipal corporation — when injunction will lie to restrain opening street.

An injunction will lie, at the suit of the proprietor, to restrain a municipal corporation from opening a new street on his land, and collecting a sum of money out of him, assessed as his benefit of the proposed improvement, and his contribution to the cost of opening the street, when the proceedings of the corporation appear to be regular, and their invalidity is to be shown by extrinsic evidence.

BILL in equity for an injunction. The facts are sufficiently stated in the opinion.

E. S. Dargan, for appellant.

Raphael Semmes & O. J. Semmes, contra.

B. F. SAFFORD, J. The bill of the appellant was dismissed on the ground of adequate remedy at law. He complained that the appellees, under the authority of the 94th section of the charter of Mobile city, and in pretended compliance with it, ordered a new street to be opened through a lot belonging to him, and appointed

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a jury to ascertain and assess the damages and benefits to result from it to the adjacent proprietors, without notice to them, and that they determined he would be benefited \$175. They returned this verdict to the said defendants, who were about to open the street, and collect the above sum of money from him in the manner prescribed by the charter. He alleged that only one of those who made the application owned any land adjacent to the proposed street, and he owned less than one-fourth. He prayed for an injunction against the opening of the street and the collection of the money.

The defendants admitted the truth of the statements in the bill, but denied that they entitled the complainant to the relief sought.

Section 94 of the charter authorizes the defendants to make a new street upon the written application of the owners at least one-fourth in quantity of the property through or over which the new street is desired to be made. But it is to be done at the expense of those whose property is benefited by and adjacent to the street. A jury is to ascertain and assess this benefit to each proprietor, and the amount assessed is to be a lien on his said property, and collectible as the taxes on real estate are to be collected under the charter. The charter makes the assessed taxes a judgment, and authorizes a sale of either real or personal property for their payment. §§ 38, 39. The benefited parties are required to contribute to the expense of the street, although the forms prescribed by the said section 94 may not have been strictly complied with. The request and the ordinance complying with it are alone to be deemed essential to create the claim for contribution.

I do not know that any definite line of separation can be drawn between the jurisdictions of law and equity in matters of this sort. The general rule is, that the correction of errors in the proceedings of such inferior jurisdictions is matter of legal cognizance, and probably under our loose system of practice, a *certiorari* to the circuit court would procure a reversal of what has been done in this case. But there are three recognized exceptions to this rule: 1st. Where the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions. 2d. Where they lead in their execution to the commission of irreparable injury to the freehold. 3d. Where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside,

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and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality.

This case may properly come within the third exception. A number of citizens signed the application for the opening of the street. It is denied that they were proprietors of one-fourth in quantity of the adjacent lands. This is an extrinsic fact necessary to be proved. It was essential that they should be.

The complainant also denies that he was benefited \$175, and claims that he was injured several hundred dollars. These facts require external proof, while the contrary appears upon the proceedings. *Baldwin v. City of Buffalo*, 29 Barb. 396, was very similar to this case, and the court reviewed the case of *Brooklyn v. Meserole*, 26 Wend. 132, in which it was held that an injunction was not the proper remedy, and also the case of *Heywood v. City of Buffalo*, 14 N. Y. 534, the principles of which it adopted. While it is entirely proper to preserve the two systems of jurisprudence distinct, it is impossible to keep them from trenching upon each other, and justice and the reasonable satisfaction of the people are more to be desired.

Section 94 of the charter violates article 13, section 5 of the State constitution, which prohibits any appropriation of a right of way to the use of a corporation until full compensation be first made in money, or secured by deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, the compensation to be ascertained by a jury of twelve men in a court of record.

The decree is reversed, and a decree will be rendered in this court granting the relief prayed for.

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(47 Ala. 608.)

Criminal law — Evidence — character of deceased — character of defendant.

On a trial of an indictment for murder, under a statute dividing murder into two degrees and requiring the jury to pass upon the guilt or innocence of the accused, and also, on conviction, to find by the verdict whether it be murder in the first or second degree, and to determine the character, the extent and severity of the punishment to be inflicted: *Held*, that evidence of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man, is admissible to enable the jury to determine the degree of the offense, and the character and measure of the punishment.

Where the general good character of the accused as a peaceable man is proved, the following is a correct charge, to wit: "If the prisoner be proved of good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed, but for such good character;" and if asked in writing, it is error to refuse it. (*See note, p. 776.*)

APPELLANT was indicted and tried for the murder of Jesse Dumas, found guilty of murder in the second degree, and sentenced to the penitentiary for ten years.

On the trial it was proved that the killing took place in the public highway, in front of defendant's gate, in the month of December, 1870. It seems that defendant had attached some property belonging to deceased's sister a short time before the killing. A little after mid-day on the day of killing, defendant was at the house of a neighbor named Sarter. Shortly after this, deceased, who was a powerful man, came there and commenced abusing and cursing defendant; deceased's conduct, according to the evidence, being overbearing, and indicative of a determination to force a difficulty with defendant. Finally, deceased called defendant a gin-house burning, thieving son of a bitch, twisted his nose, struck him in the face with his hat, and pulled defendant off the steps where he was sitting, jerking him by the collar. A nephew of deceased had a pistol drawn during part of the difficulty. Defendant made no resistance; "said that he did not want to fight." After this the parties separated, deceased going to Society Hill, where he remained two or three hours drinking whisky, and defendant started home. As soon as defendant got to his house, which was about three o'clock

in the afternoon, he went to his room, got his gun, firing off the old loads, and reloaded it with buckshot in each barre., remarking that he would kill the d——d rascal before morning.

The proof as to what occurred at Sarter's was made by the defendant without objection on the part of the State.

The deceased, toward sundown, left Society Hill on horseback to go home, passing by defendant's house. Deceased was shot at defendant's gate. How the parties met there does not appear.

The witness who proved the shooting testified, that he was at Mr. Sarter's, about one hundred and fifty yards from defendant's house; that he heard loud talking in the direction of defendant's house; that he did not see any one at first, but only heard loud talking; that he heard deceased say, "Fields, I am not afraid of you," and heard defendant say, "You accused me of burning your gin-house." When the witness reached a point where he could see the parties, deceased was on his horse in front of defendant's gate, leaning forward on his horse, and the horse's head was in the direction of deceased's home. Defendant, with his gun in his hands, was in front of deceased. Defendant shot, and deceased fell dead from his horse. Another witness testified, that about sundown she heard defendant say, "You called me a gin-house burner, and I'll shoot you;" and deceased then said, "go into your yard," about the time the gun fired. Witness could not see the position of the parties at the time, as she was behind a tree. Defendant remarked to persons at his house, shortly after the gun fired, "I have shot the d——d devil, and would kill any man who would charge me with burning his gin-house and call me a thief."

There was no proof that deceased had any weapon about him when he was shot. Defendant proved his character as a peaceable and law-abiding man to be good. There were several witnesses examined on either side, but the foregoing is the substance of all the testimony.

The defendant asked several witnesses, some of whom he introduced, and of others on cross-examination, whether they were acquainted with the general character of the deceased, etc., for turbulence, violence, bloodshed, and recklessness of human life. The court, upon the objection of the solicitor, refused to permit this question to be answered, and defendant excepted.

The bill of exceptions further states, that the defendant, on cross-examination of a State's witness, proposed to ask of the witness the

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same question as stated above, with the additional inquiry, if he, "witness, had, before the shooting, communicated to the prisoner any instance of the exercise of such character by deceased." Upon objection by the solicitor the court would not permit an answer to either question, and defendant duly excepted. The bill of exceptions does not state the purpose for which defendant desired to make the proposed proof, nor the ground upon which the solicitor objected.

The court gave a charge to the jury, at the instance of the State, which need not be further noticed, to which defendant excepted. The defendant requested the court, in writing, to charge the jury as follows: "If the prisoner has proved a good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed but for such good character." The court refused to give this charge, and defendant duly excepted.

L. W. Martin, for appellant.

Attorney-General and Hooper, contra.

PECK, C. J. Was the evidence offered by the defendant, that the general character of the deceased was that of a violent, turbulent, revengeful, blood-thirsty, dangerous man, and reckless of human life, properly excluded by the court? I feel constrained to answer this question in the negative.

By the common law the jury determined merely the guilt or innocence of the prisoner; and, if their verdict was guilty, their duties were at an end. They had nothing whatever to say as to the punishment to be inflicted. The court alone determined what the punishment should be, its extent and its severity; with that the jury had nothing to do. Their whole duty was discharged when the verdict of guilty was pronounced.

The common law, on this subject, has been greatly changed by our statutes, and the duties and responsibilities of juries largely increased; consequently, evidence that would have been irrelevant and impertinent at the common law, becomes proper and necessary, under our statute, to enable juries to discharge their newly imposed duties rightly and properly.

By our statute the crime of murder is made one of degrees, divided

into murder in the first and second degree. Rev. Code, § 3653. Section 3654, Revised Code, enacts, that “any person who is guilty of murder in the first degree, must, on conviction, suffer death, or imprisonment in the penitentiary for life, *at the discretion of the jury*; and any person who is guilty of murder in the second degree must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than ten years, *at the discretion of the jury*.” Section 3657 provides, that “when a jury find the defendant guilty, under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree; but, if the defendant, on arraignment, confesses his guilt the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of testimony, and pass sentence accordingly.”

Here, we see that the degree of the crime must be determined by the verdict of a jury, upon an examination of testimony, and the punishment to be inflicted on the defendant rests in the discretion of the jury. If the crime be murder in the first degree, the jury must determine whether the punishment shall be death, or imprisonment in the penitentiary for life. If in the second degree, the defendant must be imprisoned in the penitentiary, or be sentenced to hard labor for the county, for not less than ten years, *at the discretion of the jury*. Testimony is as necessary and important to enable the jury to exercise this discretion prudently and properly, as to enable them to determine the guilt or innocence of the defendant. The jury have two important duties to perform, and both are to be governed and controlled by the evidence, and neither can be wisely nor rightly discharged without evidence. As these duties are different, the evidence must necessarily be different. After the guilt of the defendant is settled, the proper evidence, to determine the degree of his crime, and what should be the extent and severity of his punishment, must, in great measure, depend upon a careful examination of the circumstances, not those only immediately attendant on the killing, but those also which may reasonably be supposed to have led to it; and these circumstances should be considered in connection with the good or bad character, both of the defendant and the deceased. Who is prepared to say the punishment should be the same where a turbulent, revengeful, blood-thirsty, dangerous man, reckless of human life, has been slain, who had recently, only a few hours before, violated and outraged the

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person of his slayer, as though the party slain had been a man of good character, and of a peaceable disposition? For myself, I cannot, conscientiously, say so. Although the violence and outrage committed upon the person of the defendant, in this case, might not have been sufficient to reduce the offense from murder to manslaughter, yet, we hold it was clearly proper for the consideration of the jury in determining the turpitude of the crime, and what should be the measure of the punishment to be inflicted. If the evidence of the general bad character of the deceased was proper, only in the latter case, it should have been received and not excluded by the court.

2. The charge in writing, which defendant requested the court to give to the jury, we think was improperly refused. The good character of the defendant as a peaceable man was proved by several witnesses. In the case of *The Commonwealth v. Hardy*, 2 Mass. 303, Chief Justice PARSONS said he was of the opinion that a prisoner ought to be permitted to give in evidence his general good character in all criminal cases; Justices SEWALL and PARKER said they were not prepared to say that testimony of general good character should be admitted in behalf of the defendant in all criminal prosecutions, but they were clearly of the opinion that it might be admitted in capital cases, in favor of life. In Roscoe's Cr. Ev. 96, it is said: "In trials for high treason, for felony and for misdemeanors, where the direct object of the prosecution was to punish the offense, the prisoner was always permitted to call witnesses to his general character; and in every case of doubt, proof of good character was entitled to great weight." In the case of *Felix (a slave) v. The State*, 18 Ala. 720, it is decided that "in criminal cases, evidence of previous good character is proper for the consideration of the jury, not only where a doubt exists upon the other proof, but even to generate a doubt as to the guilt of the accused."

The evidence of good character was admitted in this case, but the error of the court consists in refusing to give a proper charge based upon said evidence. I do not say the evidence of good character should have created a reasonable doubt in the minds of the jurors in this case, when considered in connection with the other evidence. But as the law permits evidence of good character in criminal cases, it certainly intends it for the consideration of the jury, and it is for the jury alone to determine whether, when con-

sidered with the other evidence, it does or does not create a reasonable doubt as to the defendant's guilt.

It is manifest that a part of the charge given at the request of the solicitor, and excepted to by the defendant, is left out in copying it into the transcript. As the charge there appears it is unintelligible, and we cannot tell whether it was right or wrong.

For the errors in excluding the evidence of the general bad character of the deceased, as a violent, blood-thirsty man, etc., and in refusing to give the charge asked, the judgment and sentence of the court below is reversed, and the cause is remanded for another trial; and the defendant will remain in custody until acquitted, or discharged by due course of law.

NOTE.—That in cases of homicide evidence of the character or disposition of the deceased is not generally admissible, see *State v. Hogue*, 6 Jones (N. C.), 881; *State v. Barfield*, 8 Ired. 344; *Commonwealth v. Farrigan*, 8 Wright (Pa.), 388; *Newcomb v. State*, 37 Miss. 383; *Queensberry v. State*, 3 Stew. & P. 308; *State v. Field*, 14 Maine, 244; *Commonwealth v. Mead*, 13 Gray, 167; *State v. Hawley*, 4 Harring. 552; *State v. Jackson*, 17 Mo. 544; *Commonwealth v. Hillard*, 2 Gray, 294; *People v. Murray*, 10 Cal. 309; *Campbell v. People*, 16 Ill. 17. But evidence of the bad character of the deceased has been admitted as bearing on the question whether the homicide was malicious or was prompted by the instinct of self-preservation, (*Monroe v. State*, 5 Ga. 85; *State v. Hicks*, 27 Mo. 588); and in case where the evidence as to the homicide is entirely circumstantial. *State v. Barfield*, 8 Ired. 344.

In *Franklin v. State*, 29 Ala. 14; *Dupree v. State*, 33 id. 180; *Ben v. State*, 37 id. 103, evidence of the bad character of the deceased was held admissible. So in *State v. Smith*, 12 Rich. (S. C.), 430, on an indictment for homicide, evidence that the deceased was a turbulent and violent man, and carried arms about him, was held admissible, provided the defendant knew of the fact. To the same effect are *Payne v. Commonwealth*, 1 Metc. (Ky.) 370; *Kippy v. State*, 2 Head (Tenn.)

Evidence is admissible to show expressions of good will and acts of kindness on the part of the prisoner, toward the deceased, as indicating what was his general disposition toward the deceased. 1 Phillips Ev. 470.

In *People v. Stokes*, 53 N. Y. 164, it was held that evidence of violent threats made by the deceased against the prisoner a short time before the homicide, although such threats were not communicated to the prisoner, were admissible, evidence having been previously given making it a question for the jury whether or not the homicide was committed in self defense. To the same effect are *Keever v. State*, 13 Ga. 194; *Pritchette v. State*, 23 Ala. 39; *Cornelius v. Commonwealth*, 15 B. Mon. 539.

2. As to the admissibility of evidence of the good character of the prisoner. This evidence is admitted *favorem vitæ*. *Ree v. Harris*, 2 State Trials, 1098; *Commonwealth v. Hardy*, *supra*; *United States v. Roudenbush*, Baldwin, 514; *McDaniel v. State*, 3 Sme. & Marsh 403; *State v. Schaller*, 14 Mo. 502; *Ree v. Stannard*, 7 Car. & P. 673; *Commonwealth v. Webster*, 5 Cush. 894.—RHP.

. CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

WOODRUFF, appellant, v. SCRUGGS.

(27 Ark. 28.)

Usury — repeal of laws.

The repeal of usury laws takes away the defense of usury in actions then after brought on any contract, whether made prior to or after the repeal.

THE appellee sued the appellant in the Pulaski circuit court, on a note executed in 1866, and due in two months. The appellants pleaded usury. To this plea Scruggs demurred.

First. Because there were no usury laws then, when the plea was filed, in this State.

Second. The plea failed to aver specifically a corrupt intent.

The court below sustained the demurrer — appellants resting, judgment was rendered against them; they appealed to this court.

Watkins & Rose, for appellant. We submit that the statute ought not to be construed so as to have a retroactive effect, or to make contracts good that were illegal at the time they were made. *Baldwin v. Cross*, 5 Ark. 510; *Crittenden v. Johnson*, 14 id. 464; *Crouch v. McKee*, 6 id. 493. That the repeal of the usury laws did not affect contracts in force at the time of the repeal, see particu-

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larly, *Mitchell v. Doggett*, 1 Branch (Fla.), 356 ; *Merville v. Le Blanc*, 12 La. An. 221 ; *Seegar v. Seegar*, 19 Ill. 121 ; *Root v. Pinney*, 11 Wis. 84 ; *Simonton v. Vail*, id. 90 ; *Brower v. Haight*, 18 id. 102 ; *Morton v. Rutherford*, id. 298.

Garland & Nash, for appellee.

BENNETT, J. The first question for our consideration is, what was the effect of the repeal of the statute of usury of 1838, by the act of the legislature of 1868.

The seventh section of chapter 92 of Gould's Digest reads as follows: "All bonds, bills, notes, assurances, conveyances and all other contracts or securities whatsoever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any sum of money, goods or things in action, than is prescribed in this act, shall *be void*."

The prescription is found in the second section of the same chapter, and is, in effect, as follows: "Parties may agree in writing for the payment of interest, *not exceeding* ten per centum per annum, on money due or to become due upon any contract, whether under seal or not."

The constitution of the State, which went into effect in 1868, in article 15, section 21, gave to the general assembly the power to declare, by general law, what shall be the legal interest upon contracts, when no rates of interest were specified ; but distinctly declares that no law should ever be passed limiting the rate of interest for which individuals may contract in this State. The general assembly, which met under the authority of the constitution of 1868, on the 13th day of July of the same year, repealed all of chapter 92, Gould's Digest, with the exception of sections 4, 10, 11, 12. By the same enactment, it was declared to be lawful for parties to stipulate in the note and agree on any sum of interest that may be taken and paid upon any \$100 of money loaned, etc. Section 6 of the same act says: "No plea of usury, nor defense founded upon any allegation of usury, shall be sustained in any court in this State."

We learn from Sedgwick, in his work on Statutory and Constitutional Law, pp. 129-131, and the cases there cited, "that there can be no doubt of the truth or validity of the assertion that

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when there is a repeal of a penal statute, no penalty can be enforced, nor punishment inflicted for a violation of the law while in force, unless under some special provisions." Nor can it be denied that the general assembly can alter or modify the remedy as to the enforcement of contracts, unless the enactment should virtually or substantially take away the same.

Section 6 of the act of the legislature, approved July 13, 1868, abolished the defense of usury in the State, and the same act repealed all usury laws on our statute books.

While we are not prepared to say that "the plea of usury, sustained under our former law, was in its effects a penalty upon the plaintiff in the loss of his entire debt, and thus place parties, coming under the operation of that law, in the same situation they would have been under an absolute penal statute," we can, with safety, say that the statute repealing the usury laws and abolishing the defense of usury, operated upon all contracts made before it was passed, still outstanding, as upon all future contracts. The act was unquestionably retrospective in its character. All general rules of construction must yield to the clear intention of the legislature, sufficiently expressed. In this instance, the intention is clear and fully expressed when it declares: "No plea of usury, or defense founded upon any allegation of usury, shall be sustained in any court of this State." It makes no reservations or exceptions, but is emphatic — commanding the courts not to sustain any such plea.

The appellant insists that this statute shall not be construed so as to make contracts good that were illegal at the time they were made, or in other words, making that valid which was before void. In defense of his position he has cited numerous cases. One of the most pointed is that of *Morton v. Rutherford*, 18 Wis. 298. Judge COLE, in delivering the opinion, says: "Subsequent legislation is relied on to show that the defense of usury is not available. By the law in force at the time the contract was made it was usurious and void. To the same effect was the law when the suit was commenced, and by the law of 1856, an usurious contract was declared valid and effectual, only to secure the repayment of the principal sum loaned. But how this *latter* enactment, even if it attempted it, could render valid an antecedent contract which was void, we do not comprehend. The law of 1856 can have no bearing upon the question. The defense of usury is doubtless available."

The case of the *President, Directors, etc., of the Springfield Bank v. Samuel Merrick et al.*, 14 Mass. 322. In Massachusetts there was a law that the bills and notes of banks, not incorporated by law, should not be received or negotiated by banking corporations of that State under a heavy penalty. It was held that a promissory note, payable in such bills to a banking corporation, made while the statute was in force, was void, and that no action could be maintained upon it by the promisees after the statute was repealed. Chief Justice PARKER remarked that "the subsequent repeal of the act can have no effect upon a contract while it was in force. As well might a contract made for the purpose of trade with an enemy, during war, be purged of its illegality, by the return of peace."

The case of *Mitchell v. Doggett*, 1 Fla. 871, is also cited by appellant, with approbation, wherein Chief Justice HAWKINS says: "When a contract is illegal, at the time of its inception, by force of a statute, no action can be maintained upon it, although the statute is repealed which declared it illegal." Other adjudications are cited, but the above are the strongest among them.

While we are willing to admit that the above opinions are entitled to great respect, emanating as they do from the highest tribunals of the States, yet we must respectfully dissent from the principles of law thus laid down, so far as they relate to usurious contracts. In our opinion, they are not dictated by any principles of sound policy, morality or law.

While the statute of 1868, by declaring that "no plea of usury, nor defense founded upon any allegation of usury, shall be sustained in any court of this State," and repealing all previous usury laws, may affect injuriously the antecedent legal rights of the borrower, the appellant, in this case, under the contract, there is much of reasonable intendment and allowable presumption derived from the nature of the right affected and the circumstances under which the contract was made. It may be well doubted whether the borrower, under an usurious contract, has any antecedent rights of the nature of vested rights, created by this contract, or existing under and by the terms of it, which the law can affect. How do Woodruff's rights stand in a legal point? They are, under and by the terms of the contract, to receive and enjoy, until demanded, the money of Scruggs. Scruggs' rights are to receive interest and the principal sum when due. But the statute of usury, operating upon them, avoided his right to demand them and the legal obligation of

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Woodruff to pay. This privilege of refusing to pay the claim upon demand, not under and by virtue of the terms of the contract, or any presumable intention of the parties different from that which appears upon its face (for we think it would be doing Woodruff injustice to suppose he took the money from Scruggs originally with the intention of enjoying it without ever repaying), but under and by virtue of a general law, it is the only antecedent right of the defendant which the statute of 1868 can affect. That privilege, and it was nothing more than a privilege, the legislature intended to take away by validating the contract in this respect. The right of the defendant originated in a statute founded upon policy, intended to protect the needy borrower from the presumed temptation of the lender to demand exorbitant interest for forbearance. That right of the defendant, to insist upon a forfeiture by the plaintiff of his debt, was a legal right before the repeal, but not an equitable one. The courts of equity do not view the statute as courts of law are compelled to do. If a borrower goes into a court of equity, in respect to a security given in connection with usurious contracts, or to avoid extortion or oppression, the court will always compel him to pay principal and legal interest, because there is a moral obligation resting on him to do so, and it is equitable that he should be compelled to do it.

In the case of *Kilbourn v. Bradley*, 3 Day, 356, the court said: "The statute against usury, on principles of public policy, renders void contracts upon usurious considerations. But the lender incurs no penalty unless he actually takes usury, and courts of equity, on relieving against oppression or extortion, order the repayment of the sum really loaned or due, with lawful interest. The moral obligation of the borrower to pay the principal sum actually loaned, with the lawful interest, is unimpaired."

In the language of Judge DUNCAN in *Satterlee v. Matthewson*, 16 Serg. & Rawle, 191, "there can be no vested right to do wrong." In the case of *Baughner et al. v. Nelson*, 9 Gill, 309, the court say: "In the nature of things there can be no vested right to violate a moral duty or to resist the performance of a moral obligation, and although a borrower may be justified in morals, as he is in law, in resisting the payment of illicit interest, extorted from him in consequence of his necessitous condition, he certainly can have no right, as a matter of private justice, to repudiate his contract so as to escape from the payment of the sum actually received." The doc-

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trine announced in these cases, and many more might have been added, stands upon the principle that the borrower is, at all times and under all circumstances, under a moral obligation to pay to the lender the sum actually loaned, with interest as a fair compensation for its use. This is all the law of 1868 purposes to accomplish. The legislature, in the exercise of its remedial authority, expressly given it by the constitution, comes to the aid of all courts, both legal and equitable, and declares no plea of usury, nor any defenses founded upon usury, shall be heard or entertained in them.

The chancellor, in the case of *Wilson v. Hardesty*, 1 Md. Ch. 66, made use of the following language: "Notwithstanding the language of the act of 1704 is so strong, it is very certain that contracts within its provisions are not, under all circumstances, treated as merely void." This was a case where the complainant was seeking to avoid the contract because it was usurious, as the statute of Maryland declared that all such contracts were absolutely void. The contract, in the present case, was wrong, only because the statute prohibited more than ten per centum, and was wrong, only as to the additional interest expressed on the face of the note. For that wrong the statute said the contract should be void. Since then the legislature has taken away this penalty and has said, in effect, such contracts are valid. That it had the power to do this admits of no serious question.

We might have disposed of this case upon the simple proposition as to the power of the legislature over remedies, but, inasmuch as the defense has been based upon the fact of the illegal nature of the original transaction, we have thought it our duty to say what we have as to the equitable nature of it, outside of the statute which has declared usurious contracts void.

The emphatic condemnation of the act of July 13, 1868, wherein it says, "No plea of usury, nor defense founded upon any allegation of usury, shall be sustained in any court of this State," is mandatory upon all courts, and is only depriving defendants of the privilege of making a certain defense, which before was permitted. Such mandate, operating only upon the remedy, without destroying a right, the legislature was acting within its scope and power.

As to the second ground of demurrer, it will not be necessary for us to argue, the subject-matter not being allowed to be pleaded, it cannot be of any importance how it might be done. The court did not err in sustaining the demurrer, therefore judgment is affirmed

Judgment affirmed

Rice v. Shook.

RICE v. SHOOK.

(87 Ark. 187.)

War — commercial intercourse.

Action on a promissory note. Plea that when the note was made, plaintiff was a citizen of Minnesota, and defendant a citizen of Arkansas, aiding the rebellion and public enemies of the United States. *Held*, that the plea was good.

ACTION on a promissory note.

Byers & Cox, Rice & Benjamin, for appellant.

Watkins & Rose, for appellees.

HARRISON, J. This was an action upon a promissory note for \$400, executed to the appellant by the appellees, and dated at Little Rock, February 7, 1865.

The only question in the case is raised by a demurrer to the defendant's plea, which alleges that the note was executed during the late civil war, and that, at the time, the plaintiff was a citizen of the State of Minnesota, and the defendants were citizens of the State of Arkansas, adhering to and aiding the rebellion, and public enemies of the United States, and that the execution of the same was not by any license or permission of the United States.

That during the war, the *status* of the inhabitants of the insurrectionary States, outside of the territory therein held by the United States forces, was that of public enemies of the government, was conclusively settled by the supreme court of the United States, in the *Prize cases*, 2 Black, 655, and the case of *Mrs. Alexander's cotton*, 2 Wal. 404; and see, also, *Philips v. Hatch*, 1 Dill. C. C. Rep. 571; and it is a principle of public law recognized by all nations, that during war, all trade and intercourse between the citizens or subjects of one of the belligerent States or powers with those of the other are interdicted, except by the license or permission of the government, or in the mere exercise of the rights of humanity. Consequently, all contracts made with a public enemy, without the license or permission of the government (no contract can arise from

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the mere exercise of the offices of humanity), are, upon the ground of public policy, invalid and void.

Although the court will judicially notice that, at the date of the note, Little Rock and a large part of the State were, and had been for some considerable time previously, in possession of the forces of the United States, yet no such inference, as that the defendants resided there or in the territory over which the government had re-established its authority, and could not longer be regarded as enemies, can be drawn therefrom, in opposition to the direct averment of the plea that they were public enemies. The plea was good and the demurrer to it was, therefore, properly overruled.

Judgment affirmed.

McCLURE, C. J., dissenting.

HECHT, appellant, v. SPEARS.

(27 Ark. 229.)

A vendor's lien is not assignable.

LEVI HECHT brought his complaint, in chancery, against the administrator of John Dodd, deceased, and against the widow of Dodd and her husband, she having married after Dodd's death.

The complaint alleges that one Campbell had sold Dodd a tract of land, for which Dodd gave Campbell his note for \$500, for one-half of the purchase-money; Campbell giving a deed for the land. Afterward, Campbell transferred the note to Hecht, the complainant, by an indorsement in words and figures as follows:

"For value received, I assign and transfer the within note, together with the vendor's lien and my equities to and upon the following lands: South $\frac{1}{4}$ of the south-east $\frac{1}{4}$ of section 31, township 19 north, range 3 east; and the north-west $\frac{1}{4}$ of section 6, of township 18 north, of range 3 east, to Levi Hecht.

"(Signed)

C. F. CAMPBELL."

"RANDOLPH COUNTY, April 23, 1870."

Hecht v. Spears.

The complainant seeks to have a vendor's lien declared and enforced. Defendants demurred to the complaint; the demurrer was sustained and the plaintiff appealed.

Watkins & Rose, for appellants.

BENNETT, J. It is settled law that the vendor has a lien for the purchase-money, though he make the purchaser an absolute deed, reciting the receipt of the purchase-money; and this, against the vendee or a person purchasing with notice that the purchase-money is unpaid. *Scott v. Orbison*, 21 Ark. 202; *Harris v. Hanks*, 23 id. 510.

Also, that the mere assignment of the note, under such circumstances, does not carry with it the vendor's lien. *Shall v. Biscoe*, 18 Ark. 162; *Simpson v. Montgomery*, 25 id. 372. But the question arises in the case at bar, can the vendor's lien be transferred, by an express assignment, as legal rights may be?

It seems to be settled, that if a debt is secured by an express lien, as where there is a mortgage, or when the vendor has not parted with the legal title, and assignment of the debt entitled the assignee to the benefit of the pledge. *Eskridge v. McClure et al.*, 2 Yerg. 84; *Farmer v. Hicks et al.*, 4 S. & M. 294; *Norvell v. Johnson*, 5 Humph. 489.

But a vendor's equity or implied lien is not necessarily governed by the same principle. "The lien of a vendor for the purchase-money," says STORY, J., in *Gilman v. Brown et al.*, 1 Mason, 192, "is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law; whereas, the former is a mere creature of a court of equity, which molds and fashions according to its own purposes. It is, in short, a right which has no existence until it is established by a decree of a court in the particular case, and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although sometimes that appellation is loosely applied to it."

If, then, a vendor's lien "is a right which has no existence until it is established by the decree of a court," how can it be assigned before its existence? That which does not exist cannot be parted with. A vendor's lien is a lien of a peculiar character. It is not

like the common-law lien of factors, innkeepers and others, associated with and entirely dependent upon actual possession of the property on which it is a tie; it is not like a general judicial lien, which springs into existence in favor of a party who obtains judgment, which enables him to take the lands of the defendants in execution, and continues as such until the judgment is satisfied; nor is it altogether like a common mortgage, although it operates and is treated in many respects as a mortgage. It differs from all these in this, that if it exists at all, it must originate with, and be an incident of the purchase itself. This doctrine, in relation to these liens, it is said, has been probably derived from the civil law as to goods. *Mackreth v. Symmons*, 15 Ves. 344; *Walker v. Priswick*, 2 Vet. 622. And it seems that such a lien upon goods is a personal right which cannot be transferred to another. *Danbegny v. Du Val*, 5 F. T. R. 606.

It is indispensably necessary to the existence of such a lien, that the parties should stand in the relation toward each other of *vendor* and *vendee* of *real estate*, the purchase-money of which has not been paid. The pure relationship of debtor and creditor, or of borrower and lender, is incompatible with the existence of this species of liens.

In the case of the purchase of real estate, this lien arises as an incident thereto, and can only exist together with it. In the case of a loan, the debt is the principal, and the bond, note or mortgage are only accidents to it. A purchase may be made or a debt may exist without an equitable lien or a bond, note or mortgage as its incidents. A bond, note or mortgage may, however, be executed as being in itself the creator, evidence and incident of a debt; but a vendor's lien cannot be thus made and executed apart from, and independently of a contract of purchase. It is an incumbrance on land which can only be held by a vendor or his legal representative; and though assets may be marshaled so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet no third person can, as assignee of the vendor, derive any benefit from such lien, nor can it, like a bond or mortgage, be assigned, because it is not expressed in writing, or in any separate contract, but exists only as an inseparable equitable incident of the contract of purchase; and, as is seen from the above quotation from Judge STORY, is only to be raised by construction of equity, in favor of the vendor only. "This lien would, no doubt, pass, on the

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death of the vendor to his representatives, but it is not the subject-matter of sale and transfer by contract. *Keith v. Horner*, 32 Ill. 526. "Such a lien is not assignable, even by express language." *Richard v. Seammy*, 27 id. 431; *Keith et al. v. Horner, supra*.

A vendor's lien being founded upon an implied trust, between the vendor and purchaser, we are satisfied that the law does not authorize the vendor to transfer this lien with the note taken for the purchase-money, even though he expressly professes to do so and we are not inclined to make a law to enable him to do so.

The decree must be affirmed.

Decree affirmed.

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ACCEPTANCE.

See BILL OF EXCHANGE, 514.

ACCOUNT STATED.

It is no bar to an action on an account stated, that the defendant's indebtedness was for liquors sold by plaintiff on Sunday, contrary to law, if the account was not stated on Sunday ; but if the sale was illegal for want of a license the action on an account stated could not be maintained. *Melchoir v. McCarty* (Wis.), 605.

ACTION.

1. Defendant for a valuable consideration agreed to assume and to save the plaintiff harmless from certain outstanding debts against him. One of plaintiff's creditors afterward commenced an action against him on a debt included in the agreement. *Held*, that plaintiff could maintain an action against defendant on the agreement without alleging payment or discharge by him of the debt ; and (2), that plaintiff could recover the full amount of the debt. *Slout v. Folger* (Iowa), 188.
2. The plaintiff agreed orally to cultivate defendant's land for two years for a share of the crop, it being understood at the time by both parties that the crop would be more valuable the second year than the first. At the end of the first year the crop was divided according to the contract, but the defendant refused to let the plaintiff cultivate the land for the second year. *Held*, that plaintiff could maintain an action for work done and materials furnished in cultivating the land. *Williams v. Bemis* (Mass.), 818.
3. An action will not lie for distraining for more rent than is due. *Hamilton v. Windorf* (Md.), 491.

See BANKRUPT LAW, 628 ; CONTRACT, 509 ; REPLEVIN, 618 ; WATER-WORKS, 852.

ADJACENT PROPRIETORS.

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ASSESSMENTS FOR LOCAL IMPROVEMENTS.

A charitable corporation, which is, by its charter, "exempted from taxation of every kind," is not exempted from special assessments against its property for improvements in a street on which it abuts. *Sheshan v. The Good Samaritan Hospital* (Mo.), 413, and note, 413.

ASSIGNMENT.

See VENDOR'S LIEN, 784.

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See DURESS OF PROPERTY, 10.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 567.

AWARD.

An award that the defendants have a right to keep up and maintain their dam at a certain height, and to keep thereon flash-boards twelve inches wide, at all times except in times of "freshet," held, bad for uncertainty, the word "freshet" so varying in its meaning as to necessitate constant litigation. *Harris v. The Social Manufacturing Co.* (R. I.), 224.

BANK.

See CHECK, 667; SURETY, 231.

BANKRUPTCY.

1. The bankrupt act does not suspend or supersede a "poor debtor law" of a State, which permits a debtor, taken on execution, to be discharged on making a general assignment of his property for the benefit of the judgment creditor. *Marsh v. Hall* (R. I.), 245.
2. A judgment in an action of trespass for assault and battery is a debt provable under the bankrupt act. *Manning v. Keyes* (R. I.), 249.
3. A creditor who was fraudulently omitted from the schedule filed by a bankrupt in proceedings under the bankruptcy act, and who had no actual knowledge of the proceedings until after a granting of a discharge to the bankrupt, applied to the United States district court, under section 34 of the act, to annul the discharge for that cause. Held, that he could not afterward impeach the discharge in an action on his debt in a State court. *Burpee v. Sparhawk* (Mass.), 320.
4. A certificate of discharge in bankruptcy, under the act of 1867, chapter 176, cannot be impeached in a State court, in an action upon a debt of a nature to be barred by a valid discharge, on account of the fraudulent conveyance of property by the bankrupt. *Wray v. Hows* (Mass.), 336.
5. An action by an assignee in bankruptcy, under section 35 of the bankrupt law, to recover the value of goods transferred to defendant by the bankrupt in fraud of the provisions of said act, is penal in its character, and will not be entertained by the State courts. *Brigham v. Olaffin* (Wis.), 623.

See TIME, 181.

BEQUEST.

See **WILL**, 697.

BETTING.

See **ILLEGAL CONTRACT**, 56.

BILL OF EXCHANGE.

Defendants drew a bill of exchange against a cargo and indorsed and delivered to plaintiffs the bill and also the bill of lading of the cargo, as collateral security for the acceptance and payment of the bill, authorizing them, in case they thought it necessary, to sell the cargo and apply the proceeds to the payment of the bill. The drawee refused to accept the bill without a delivery of the bill of lading. *Held*, that presentment and notice of non-acceptance were excused. *Schuchardt v. Hall* (Md.), 514.

BILLS AND NOTES.

See **CHECK**, 667, 708; **ILLEGAL CONTRACT**, 15; **PROMISSORY NOTE**.

BLANKS.

See **DEED**, 831.

BONA FIDE HOLDER.

See **PROMISSORY NOTE**, 445.

BREACH OF CONTRACT.

See **CONTRACT**, 509.

BREACH OF PROMISE TO MARRY.

In an action for damages for breach of promise to marry, evidence that, since the commencement of the action, the plaintiff has made declarations to the effect that she had no affection for defendant, and would not think of marrying him but for his property, is not admissible on the part of the defendant in mitigation of damages. *Miller v. Hays* (Iowa), 154.

BREACH OF WARRANTY.

See **VENDOR AND PURCHASER**, 719.

BUILDERS' RISK.

See **INSURANCE**, 469.

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See **FIRE**, 550; **PROMISSORY NOTE**, 319.

BURIAL PLACE.

See **INJUNCTION**, 31.

BY-LAW.

See **NATIONAL BANK**, 253.

CARRIER.

See COMMON CARRIER; FERRYMAN, 650.

CARRIERS BY WATER.

1. The plaintiffs shipped, at Liverpool, on the defendant's vessel, 881 cases of licorice, consigned to M. at New York. The vessel arrived at New York on the 25th of August, 1860, and M. was notified. He paid the duties on 181 cases, and entered 200 cases for warehousing, receiving a permit to place them in certain U. S. bonded warehouses, and delivered on board the ship a permit for the discharge of the goods. The defendant was notified that the goods were perishable, and must not be put out in rainy weather. The defendant's agent promised to discharge them in fair weather; and on the 19th of September, he notified the plaintiff's agent that if the next day was fine, he would discharge the licorice. On the 20th, it rained, in the morning, until 9 o'clock; again at 2:30 P. M.; and from 4:20 P. M., continued to rain during the rest of the day and night. At 9 A. M., the defendant's agent began to land the goods upon the wharf, and continued until noon, when the consignee was notified. At that time nearly all the cases were placed upon the wharf, and all were unloaded before 2 P. M. They could not be removed until weighed. A weigher arrived at 2:30 P. M., and finished weighing at 5 P. M. The consignee, though using great diligence, was unable to remove the licorice that day, before the warehouse closed, and a portion of it was wet and damaged by the rain. *Held*, that the referee was justified in finding, as conclusions of law, that the defendant landed the goods without reasonable notice to the consignee to enable him to have the same weighed, carted and protected from the weather; that he placed the property on the dock, with a knowledge of its perishable character, on a day unsuitable to its landing and cartage; and that, in so doing, he was guilty of negligence, and a breach of his duty and obligation as a carrier. *McAndrew v. Whitlock* (N. Y.), 657.
2. A discharge of cargo from a vessel, with the knowledge and assent of a custom-house officer placed on board for the purpose of superintending the unloading, is not such a delivery as relieves the carrier from his liability as such. *Ib.*
3. A carrier of goods, by water, may land them at a wharf, at the port of destination, but not until after he has given the consignee due notice of their arrival and unlading, and afforded him a reasonable time to take charge of and secure them. In the mean time, instead of leaving them on the wharf, it is his duty to take care of them for the owners. *Ib.*

CEMETERY.

See INJUNCTION, 21.

CERTIFICATE.

- A statute appropriated a specified sum to be paid to the relator for the purchase of certain relics of Gen. Washington, by the State, to be paid only upon the certificate of three persons named therein, that the relics were genuine, etc. *Held*, that a certificate signed by two of the persons named which stated that the third met with them, but refused to join in the certificate, was sufficient. *People v. Nichols* (N. Y.), 734.

CERTIFIED CHECK.

See CHECK, 667, 708.

CHARACTER.

See CRIMINAL LAW, 771.

CHECK.

- 1 In an action by a *bona fide* holder of a check drawn on defendant, a national bank, and certified by its cashier, *held*, that the defendant was liable, although the drawer had no funds in the bank when the check was certified. *Cook v. State National Bank* (N. Y.), 667.
- 2 The defendant drew his check to the order of D., which was discounted by the plaintiff. It was presented when due to the bank on which it was drawn for certification, and was certified as good. In the afternoon of the same day it was presented for payment, and payment refused, the drawee having in the intermediate time suspended. *Held*, that the certification operated as a payment of the check, as between the holder and the drawer, and the latter was discharged from liability. *The First National Bank of Jersey City v. Leach* (N. Y.), 708.

CHURCH DISCIPLINE.

See ECCLESIASTICAL LAW, 95.

CITY.

See MUNICIPAL CORPORATION.

COMMERCIAL INTERCOURSE.

See WAR, 788.

COMMON CARRIERS.

Plaintiff was the consignee of goods delivered to defendants, common carriers, to be by them transported to the end of their line, and there delivered to a connecting line for transportation to the place of destination. The defendants transported the goods to the end of their line, and placed them in that portion of their warehouse appropriated to goods intended for the connecting line, and from which such line was in the habit of taking goods without any notice or request. Before the removal of the goods by the connecting line, they were destroyed by fire. *Held*, that the liability of the defendants, as common carriers, continued until the goods were actually taken into possession by the connecting line, and that plaintiff could recover. *Wood v. The Milwaukee, etc., Railway Co.*, 27 Wis. 541 (9 Am. Rep. 465), overruled on this point. *Conkey v. Milwaukee & St. Paul Railway Co.* (Wis.), 630, and *note*, 643.

See CARRIER BY WATER, 657; FERRYMAN, 650.

COMPUTATION OF TIME.

See TIME, 181.

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See USURY, 45; HUSBAND AND WIFE, 711.

CONSTITUTIONAL LAW.

1. The legislature have no power to make the operation or repeal of a law dependent upon a vote of the people. Therefore, *held*, that an act prohibiting the sale of ale, wine, etc., the operation of which is made dependent upon the vote of the people in each county, was unconstitutional. *The State v. Weir* (Iowa), 115, and *note*, 117.
2. A statute requiring the party demanding a jury to pay the jury fee, and tax the same in his costs, if he prevail, is constitutional. *Randall v. Kehler* (Me.), 169.
3. The legislature cannot constitutionally authorize a town to loan its credit to persons who will, in consideration thereof, maintain a manufacturing enterprise in the town for their own private emolument. *Allen v. Inhabitants of Jay* (Me.), 185.
4. Where the constitution provides that the legislature "shall pass no special law for any cause for which provision can be made by a general law," the legislature is the sole judge as to whether provision by a general law is possible. *State v. County Court of Boone County* (Mo.), 415.
5. An act of the legislature authorized the court of appeals to reopen and rehear certain enumerated cases which had been previously decided by the court, and upon the hearing thereof, to pass such judgments, orders and decrees in the said cases as right and justice might require. On a motion to reinstate said cases, *held*, that the act was unconstitutional as an attempt on the part of the legislature to exercise judicial power. *Dorsey v. Dorsey* (Md.), 528.
6. A constitutional provision that no person shall be held to answer for a criminal offense "unless upon presentment or indictment of a grand jury," was amended by substituting the words "without due process of law." *Held*, that a statute subsequently passed giving courts jurisdiction to try prosecutions for felonies upon information, was not in contravention either of the constitution as amended or of the fourteenth amendment of the constitution of the United States. *Rowan v. State*, 559.
7. A statute appropriated a specified sum to be paid to the relator for the purchase of certain relics of Gen. Washington, by the State, to be paid only upon the certificate of three persons named therein, one of whom was at the time a judge of the court of appeals, and as such incapacitated from holding any other "office or public trust." *Held*, that the appointment was valid, it not being an office or public trust within the meaning of the constitution. *People v. Nichols* (N. Y.), 784.

See CORPORATION, 238; MUNICIPAL CORPORATIONS, 463; REMOVAL OF CAUSE, 580.

CONTRACT.

1. If an agent of a person engaged in the sale of liquors in another State, merely takes an order of a person residing in Iowa for a quantity of liquor to be forwarded to him, which order is made upon and subject to the approval or disapproval of his principal, the sale will be regarded as made in the State where the principal resides, and the case will not fall within the statute of Iowa, making void contracts for or on account of intoxicating liquors. *Tegler v Shipman* (Iowa), 118.

2. Plaintiff entered into defendant's employ, under a contract to serve as clerk till a certain time, and then to become a partner. Before that time arrived, defendant discharged plaintiff and refused to receive him as a partner, and plaintiff immediately brought action for a breach of the contract. *Held*, that the contract was entire, and the action not prematurely brought. *Dugan v. Anderson* (Md.), 509, *note*, 514.

See ACTION, 818; PARTNERSHIP, 109; SALE, 518.

CONTRIBUTORY NEGLIGENCE.

See FERRYMAN, 650; NEGLIGENCE, 420.

CONVERSION OF STOCK.

See DAMAGES, 28.

CONVEYANCE.

See DEED; ESTOPPEL, 295, 757.

CORPORATION.

1. Three persons owning a majority of the stock of a corporation, entered into an agreement, as between themselves, to elect the officers of the company and to manage its affairs as they or a majority of them should determine. *Held*, that the agreement was not illegal or void as against public policy. *Faulds v. Yates* (Ill.), 24.
2. The charter of a corporation provided that its capital stock should be \$100,000, with the power to increase it to \$500,000, but did not provide by whom this power should be exercised. *Held*, that the board of directors could not increase the capital stock without the assent of the stockholders. *Eidman v. Bowman* (Ill.), 90, and *note*, 95.
3. Plaintiff owned stock in the defendant's company, whose charter, subject to amendment, alteration or repeal at the pleasure of the general assembly, provided that the stockholders should not be liable beyond the amount of their shares for any loss sustained by the company or for any debt due thereon. Afterward the general assembly enacted that a company might fill up its capital stock if reduced from its original amount by losses, by assessment on the stockholders, pursuant to which law defendant assessed plaintiff. *Held*, that the act authorizing the assessment was constitutional. *Gardner v. Hope Insurance Co.* (R. I.), 238.
4. M., the pledgee of stock, standing on the books of the corporation in the name of "M., Trustee," and on which he had repeatedly voted without objection, voted thereon at an election of directors. In *quo warranto* against the officers declared elected at such election, *held*, (1) that M. was entitled to vote, in the absence of any claim by the pledgors to do so; (2) that after the election it was too late for the pledgors to ask the court to disturb the result. *Hoppin v. Buffum* (R. I.), 291.

See NATIONAL BANK, 258.

COUNTY.

See MUNICIPAL CORPORATION, 65.

COVENANT.

1. The owner of a farm conveyed to a railroad company a strip of it by a deed containing this clause: "I hereby covenant that I and my heirs and assigns will make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory on me and all persons who shall become owners of the land on each side of said railroad." *Held*, (1) that this covenant gave to the railroad company an interest in the nature of an easement in the grantor's adjoining land, and ran with that land, and was an incumbrance within the meaning of the covenant against incumbrances in a subsequent conveyance thereof; (2) that the obligation to maintain the fence was not impaired by the omission to perform it for twenty years, without any evidence of its having been released or extinguished; (3) that an action for a breach of the covenant against incumbrances in the second deed was not barred by the statute of limitations until twenty years after the date of that deed; (4) that the fence was to be maintained on each side of the railroad, and wholly on the land retained by the grantor in the first deed; (5) that the measure of damages for a breach of the covenant against incumbrances was a just compensation for the real injury resulting from the incumbrance, to be estimated by the difference in the fair market value of the estate by reason of the existence of the incumbrance, and taking into consideration the cost of fencing, so far only as it exceeded the cost of any fences which the situation and circumstances of the estate would otherwise have required the maintenance of. *Bronson v. Coffin* (Mass.), 385.
2. Defendant conveyed to plaintiff, by a deed containing the usual covenants, land, part of which was occupied by a railroad. In an action upon the covenant of seizin, *held*, that the covenant of seizin was not broken; but, *semble*, that the covenant against incumbrance was. *Kellogg v. Malin* (Mo.), 426, and *note*, 431.

CRIMINAL LAW.

1. If death ensues from a wound given in malice but not in its nature mortal, but from which, being neglected or mismanaged, the party dies, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death. *State v. Morphy* (Iowa), 122, and *note*, 125.
2. The statute made the "willfully and maliciously" doing of a certain act criminal. An indictment, under the statute, charged that the defendant did the act "unlawfully and maliciously." *Held*, that the indictment was bad. *State v. Hussey* (Me.), 209.
3. An indictment for manslaughter, by striking the deceased upon her head and throwing her on the floor, is sustained by proof that defendant struck her on the head, and that she fell upon the floor and was killed by striking on a chair in her fall. *Commonwealth v. McAfee* (Mass.), 383.
4. On the trial of an information for murder, which lasted through five days, the jury was permitted to separate for meals and at night and during one Sunday. The defendant was convicted of manslaughter. *Held*, that in

the absence of proof that this separation of the jury worked no harm to the defendant, the verdict was void and should be set aside, and a new trial granted. *Rowan v. State* (Wis.), 559.

5. Defendant was tried upon an indictment for murder, and was found "not guilty of murder, but guilty of manslaughter in the second degree." Upon a new trial upon the same indictment, granted upon his own motion, *held*, that he could not be convicted of murder. *State v. Martin* (Wis.), 567.
6. Upon the trial of an indictment for murder not charging any particular degree, the jury returned a verdict of "guilty," specifying no degree. The statute divided murder into two degrees. *Held*, that the verdict was bad, and that no judgment could be rendered on it. *Hogan v. State* (Wis.), 575.
7. The test of responsibility for criminal acts, where unsoundness of mind is set up as a defense, is the capacity of the defendant to distinguish between right and wrong, at the time of and with respect to the act which is the subject of the inquiry. *Flanagan v. The People* (N. Y.), 781.
8. On a trial of an indictment for murder, under a statute dividing murder into two degrees and requiring the jury to pass upon the guilt or innocence of the accused, and also, on conviction, to find by the verdict whether it be murder in the first or second degree, and to determine the character, the extent and severity of the punishment to be inflicted. *Held*, that evidence of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man, is admissible to enable the jury to determine the degree of the offense, and the character and measure of the punishment. *Fields v. State* (Ala.), 771, and *note*, 776.
9. Where the general good character of the accused as a peaceable man is proved, the following is a correct charge, to wit: "If the prisoner be proved of good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed but for such good character;" and if asked in writing, it is error to refuse it. *Ib.*

See HUSBAND AND WIFE, 883; INDICTMENT, 706.

DAMAGES.

In an action of trover for the conversion of stock, the measure of damages is the value of the stock at the time of the conversion, with interest from that time until the trial. *Sturges v. Keith* (Ill.), 28, and *note*, 85.

See ACTION, 138; TELEGRAPH COMPANY, 156.

DECEIT.

Fraudulent misrepresentations of a vendor of real estate as to the price which he paid therefor are not actionable. *Holbrook v. Connor* (Me.), 212, and *note*, 218.

DEED.

1. B. executed a deed of certain property conveying it to K. and sent it to his (B.'s) agent to be recorded, which was done. There was no pecuniary consideration for the deed, nor was there any previous arrangement or communication between B. and K. on the subject; nor had K. any knowledge of the execution of the deed; nor did he or his authorized agent ever have possession of it. Subsequently B. informed K. of the deed and K. assented

orally to receive it. *Held*, that such assent made the deed operative from the time the assent was given. *Kingsbury v. Burnside* (Ill.), 67.

2. Plaintiff sold to defendant, by deed, a lot of gravel according to specifications and profiles made by a surveyor. Blanks were left in the deed for the quantity of gravel and the sum to be paid, and the parties orally agreed that the surveyor should fill them up after ascertaining the quantity. *Held*, that he might do so after the delivery of the deed, and in the plaintiff's absence. *Voss v. Dolan* (Mass.), 831.
3. A deed not fully executed, and which had never been delivered, was stolen from the possession of the grantor, without negligence on his part, by the grantee named therein. *Held*, that no title passed, even as to subsequent purchasers. *Tisher v. Beckwith* (Wis.), 546.
4. P. executed a deed of lands to B. and placed it in the hands of S. with instructions to hold it subject to his control until his death, and then to deliver it to B. On P.'s death S. delivered the deed to B. *Held*, that there was no valid delivery, and that nothing passed by the deed. *Prutsman v. Baker* (Wis.), 592.

See COVENANT, 835, 426; DOWER, 7; ESTOPPEL, 295, 757; EVIDENCE, 491.

DELIVERY.

See CARRIER BY WATER, 657; DEED, 67, 592; SALE AND DELIVERY, 85, 200.

DEVISE.

A testatrix devised real estate to her daughter and sole heir S. for life; but "if the said S. shall have a child to cry," then to said child; and if said child should die, then over. S. and her husband conveyed the estate with warranty to P., and four months after S. had a child W. born alive. W. recovered judgment in an action of ejectment against the grantee of P. In an action by the grantee of P. against P. on the covenant of warranty, *held*, (1) that the life estate of S. under the will was not merged by the descent of the fee; (2) that the remainder in fee was vested in W., he being in *ventre sa mere* at the time of the conveyance from S.; (3) that W. was not barred by the warranty of his parents. *Orisfield v. Storr* (Md.), 480.

See WILL, 149, 751.

DISTRESS.

The goods of a principal in the store of his commission merchant for sale are not liable to distress for rent due by the latter to the landlord of the premises. *McCreery v. Clafflin* (Md.), 542.

See ACTION, 491.

DIVISION OF TOWN.

See MUNICIPAL CORPORATION, 603.

DIVORCE.

A man obtained a divorce from his wife, at a former term of the court, by false testimony, on a libel of which she had no actual notice, knowledge of which he fraudulently kept from her and of which the court had only

apparent jurisdiction founded on his false allegation of domicile. *Held*, that the court had power to vacate the decree of divorce. *Edson v. Edson* (Mass.), 898.

DOWER.

A wife, for the purpose of releasing dower, joined in her husband's conveyance, which the grantee failed to record. Afterward a subsequent creditor of the husband recovered judgment against him, and the land so conveyed was sold on execution. *Held*, that, though the prior conveyance was thus avoided, the right of dower was barred. *Morton v. Noble* (Ill.), 7.

"DUE PROCESS OF LAW."

See CONSTITUTIONAL LAW, 559.

DURESS OF PROPERTY.

Goods requiring special care, and of a perishable nature, were wrongfully taken and kept from the owner thereof by means of a writ of attachment fraudulently obtained, and were rapidly going to destruction, and the party in possession refused to surrender the goods on payment of the sum actually due, demanding more than twice that amount, and, in addition thereto, a release from all damages for his wrongful acts, and the defendant in the attachment, to obtain possession of his property, paid the sum demanded and executed the release. In an action on the case for wrongfully suing out the attachment, *held*, (1) that the release could be avoided on the ground of duress; (2) that the party injured was not restricted to an action on the attachment bond, but could maintain the action on the case; (3) that the declaration need not allege "want of probable cause" in terms, but that it would suffice if such want was substantially alleged. *Spaids v. Barrett* (Ill.), 10.

ECCLESIASTICAL LAW.

In a suit to enjoin the plaintiffs in error, as an ecclesiastical court, from proceeding with the trial of the defendant for alleged offenses and misconduct as a presbyter, *held*, (1) that the fact that the commission issued by the bishop, appointing persons to investigate the charge and make presentment, was irregularly issued, would not affect the jurisdiction of the ecclesiastical court; (2) the ecclesiastical court is the exclusive judge of the sufficiency of the presentment; (3) such court is not bound by the rules of law as to challenge of jurors; (4) where there is no right of property involved except clerical office or salary, the spiritual court is the exclusive judge of its own jurisdiction. *Chase v. Cheney* (Ill.), 95.

ESCROW.

See DEED, 592.

ESTOPPEL.

1 In an action on a promissory note, by an innocent holder for value it was conceded that the defendant's signature thereto was a forgery, but plaintiff claimed that the defendant was estopped by his declarations and conduct, from denying the execution of the note. The note was payable one

day after date. The acts relied on to create an estoppel were as follows. About a year after date of the note, plaintiff asked defendant if he was aware he held C.'s note with his name on it; to which defendant replied that he was, and that "he thought the best way was not to press C.; that if he was let alone he thought he would come out all right." C. was the forger of the note, and the one from whom plaintiff had received it. He was at the time of the above conversation in failing circumstances. *Held*, that defendant was not estopped from denying the execution of the note. *Hefner v. Vandolah* (Ill.), 89.

2. If one having no title to land conveys the same with warranty to A by a deed duly recorded, and he afterward acquires a title and conveys to B, the purchaser of B is estopped to aver, that the grantor was not seized at the time of his conveyance to A, the first grantee. The right of the purchaser of A to insist on the estoppel is not impaired by admitting, in an action for the possession of the land, that A's grantor had no title when he conveyed to him. *McCusker v. McEvey* (R. I.), 295.
3. M. made a deed purporting to convey land to which he had no title to defendant, with covenants of warranty against all persons claiming under him. Afterward M. acquired title to the land and mortgaged it to H. under whom plaintiff claimed. In ejectment, *held*, that plaintiff was estopped to say that M. was not seized at the time of the first conveyance and could therefore not recover. *Doe d. Potts v. Dowdall* (Del.), 757.

EVIDENCE.

1. While parol evidence is admissible for the purpose of explaining a receipt, this exception to the general rule, respecting the inadmissibility of such evidence to vary the terms of a written instrument, must be strictly confined to instruments which are purely receipts, and will not be extended to an instrument which embraces or is in its nature a contract. *Stapleton v. King* (Iowa), 109.
2. In a suit against the cashier of a bank and his sureties, on their bond, *held*, the admission of the cashier, that he had paid out large sums of money without the consent of the directors, is admissible evidence. *Atlas Bank v. Brounell* (R. I.), 231.
3. A person offered as a witness and expert in foreign law may state the written law without producing it, and he may produce a copy of the statutes, or code of the foreign country, and refer to the same, for the purpose of refreshing his recollection as to the law. *Barrows v. Downs* (R. I.), 288.
4. A Spanish lawyer, who had practiced law in Cuba, was allowed to testify from a printed copy of the Spanish code of commerce, as to the laws regulating special partnerships in Cuba. *Ib.*
5. A deed described the land intended to be conveyed as beginning "at a rock on the north side of a road * * * and running from thence, on the north side of said road, north, thirty-eight degrees, east, twenty-two degrees, south, sixty three degrees, east, thirty-five, south, thirty eight degrees, west, twenty-five and one-half, then by straight line to the beginning." *Held*, in an action of ejectment, that parol evidence to show that perches were intended where degrees were mentioned, at the end of the first line, and

that perches should be inserted at the end of the second and third lines was inadmissible. *Clarks v. Lancaster* (Md.), 486, and *note*, 491.

See BREACH OF PROMISE TO MARRY, 154; CRIMINAL LAW, 771; HUSBAND AND WIFE, 270; POLICE OFFICER, 373, 375; STATUTE OF FRAUDS, 495. VENDOR AND PURCHASER, 715.

EXECUTION.

See OFFICER, 613.

EXECUTORS.

See WILL, 751.

IMPRISONMENT.

1. An officer is not authorized to arrest a man without a warrant, on the ground that he is insane, unless he is dangerous. *Look v. Deen* (Mass.), 823.
2. Plaintiff being drunk and disorderly in a public place, defendant, a police officer, arrested him without a warrant, as directed by a statute for such case provided, and which also directed that the offender be taken before a magistrate. Defendant kept plaintiff in custody for an hour and discharged him without taking him before a magistrate. *Held*, that the defendant was liable for assault and false imprisonment. *Brock v. Stimson* (Mass.), 890.

FERRYMAN.

1. Ferryman do not assume all the responsibility of common carriers. Property carried upon a ferry-boat, in the custody and control of the owner, a passenger, is not at the sole risk either of the ferryman or of the owner. If lost or damaged by the neglect of the ferryman he must respond to the owner. But the latter cannot recover if he is guilty of negligence on his part, contributing to the loss. *Wyckoff v. The Queens County Ferry Co.* (N. Y.), 650, and *note*, 656.
2. When the only possession and custody by a ferryman, of a horse and carriage, is that which necessarily results from the owner's driving the same on board the boat and paying the ferriage, the ferryman is not chargeable with the full liabilities of a common carrier. *Ib.*
3. In an action against a ferry company to recover the value of a horse and carriage, alleged to have been lost through its negligence, the evidence tended to show that the chain which was provided to be put up as a guard or barrier at the end of the boat, to prevent casualties to horses, etc., was either not up or was entirely insufficient for the purpose. *Held*, that if either fact was established, and the loss resulted from that cause, the defendant was liable. *Ib.*

FIRE.

1. The stat. 6 Anne, chap. 3, § 6, providing that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin" is part of the common law of this country; otherwise of the stat. 14 Geo. III, chap. 78, § 86, which exempts from liability persons "in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin." *Spaulding v. Chicago and Northwestern Railway Company* (Wis.), 550.

3. In an action against a railroad company to recover for injuries occasioned by the escape of fire from one of its engines, *Held*, that the burden of proof is on the company to show that the engine was properly constructed and properly managed. *Ib.*

FIRE INSURANCE.

See INSURANCE.

FIXTURES.

1. The owner of a machine shop gave a chattel mortgage on the machinery therein, before it was set up, but in contemplation that it should be set up and attached to the building. He afterward, and after it was set up, gave a mortgage on the land and building. *Held*, that the second mortgagee could hold the machinery against the first mortgagee. *Pierce v. George* (Mass.), 810, and *note*, 814.
2. A mortgage of a machine shop covers machines, pulleys and shafting, bolted or screwed to the building, or to blocks bolted to the building; also essential parts of the machinery, although they can be detached therefrom without injury. But it does not cover machines which are not fastened to the floor, but are supported by their own weight; nor machines which are fastened to benches, although run from the shafting; nor vises screwed to benches although the benches are nailed to the building. *Ib.*
3. A tenant at will removed a substantially constructed house from another place, on to the land of which he was a tenant, put it upon a stone foundation, with a cellar under it, without the land owner's consent, or any contract that the tenant should hold it as personal property. *Held*, that it became a part of the realty, and could not afterward become personal property by the mere assent of the land owner without an actual severance of it from the land. *Madigan v. McCarthy* (Mass.), 871.

See RAILROAD, 747.

FOREIGN JUDGMENT.

In a suit brought upon a judgment rendered in another State, the record of which showed that the defendant appeared and pleaded therein, defendant set up in answer that he was never served with process in the original action, did not know of the action, and did not authorize any one to appear for him, and that he had a good defense to such action upon the merits. *Held* (WAGNER, J., dissenting), that the answer was good. *Mars v. Fore* (Md.), 483, and *note*, 485.

FOREIGN LAWS.

See EVIDENCE, 383.

FORGERY.

See ESTOPPEL, 89; INDICTMENT, 708.

FRACTION OF A DAY.

See TIME, 181.

FRAUD.

See DECEIT, 212 ; PAYMENT, 588 ; PROMISSORY NOTE, 445 ; STATUTE OF FRAUDS.

FRAUDULENT MISREPRESENTATIONS.

See DECEIT, 212.

GAMBLING.

See ILLEGAL CONTRACT, 15.

GIFT.

▲ gift "*causa mortis*" cannot be sustained when there has been no delivery of the subject of the gift so claimed, although at the time it was sought to be made, it was out of the reach of the would-be donor, so that the delivery was impossible. *Case v. Dennison* (R. I.), 223

GRANTOR AND GRANTEE.

See ESTOPPEL ; VENDOR AND PURCHASER.

HIGHWAY.

See INJUNCTION, 21.

HOMICIDE.

See CRIMINAL LAW, 122.

HUSBAND AND WIFE.

1. The testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, provided that no use can afterward accrue therefrom in any direct proceeding against either of them. But a husband or wife objecting to give such testimony will be entitled to the protection of the court. *State v. Briggs* (R. I.), 270.
2. A man has no right to beat or strike his wife even if she is drunk or insolent, and if he do so, and she die from such beating, he will be guilty of manslaughter, at least. *Commonwealth v. McAfee*, 888.
3. A meritorious consideration is not sufficient, in equity, to sustain a promissory note given by a husband to his wife, as against his collateral heirs. *Whitaker v. Whitaker* (N. Y.), 711.

See SALE AND DELIVERY, 200.

ILLEGAL CONTRACT.

1. A statute provided that all promises, notes, bills, contracts, etc., made upon any gambling consideration should be void ; that a court of equity might set aside any such promise, etc., and that no assignment of any bill, note, agreement or other security, as aforesaid, should in any manner affect the remedies of any person interested therein. The plaintiff indorsed certain drafts payable to his order, staked them at faro and lost. The drafts were subsequently transferred in the usual course of business, and without notice, and for a valuable consideration, to the defendant. In a suit to

cancel the indorsements, and to have the drafts delivered to the plaintiff, *held*, that the indorsements were void; that the defendant acquired no title to the drafts, and that the plaintiff was entitled to the remedy sought. *Chapin v. Dake* (Ill.), 15.

3. Plaintiff and defendant made a wager as to the result of a presidential election in another State, and deposited the money with a stakeholder. The plaintiff lost, and the stakeholder paid the money to the defendant. In an action to recover the money back, *held*, (1) that the wager was against public policy and void; (2) that the plaintiff could not recover back the money. *Gregory v. King* (Ill.), 56, and *note*, 58.

See ACCOUNT STATED, 605.

INCUMBRANCE.

See COVENANT, 835; VENDOR AND PURCHASER, 86.

INDEMNITY.

See STATUTE OF FRAUDS, 608.

INDICTMENT.

Neither the indorsements upon a check, nor a revenue stamp attached thereto, form any part of the instrument; and an omission to set them forth in an indictment for forging and uttering the check constitutes no variance. *Miller v. The People* (N. Y.), 706.

See CRIMINAL LAW, 209, 883, 575.

INDORSEMENT.

See INDICTMENT; PROMISSORY NOTE, 599; STATUTE OF FRAUDS, 608.

INFANT IN VENTRE SA MERE.

See DEVISE.

INJUNCTION.

1. A court of chancery has jurisdiction to grant an injunction to restrain town officers from wrongfully laying out a highway through a cemetery. *Trustees of First Evangelical Church v. Walsh* (Ill.), 31.
2. A public corporation may be restrained from doing an act not authorized by law on an information in equity by a law officer of the State, in the name of the State. WAGNER, J., dissenting. *State v. County Court* (Mo.), 454.

See MUNICIPAL CORPORATION, 768.

INSANE PERSONS.

See FALSE IMPRISONMENT, 833.

INSANITY.

See CRIMINAL LAW, 781; JURY, 412.

INSURANCE, FIRE.

1. A policy of fire insurance provided that, in case of loss, the company might restore or repair the property, within a reasonable time, by giving notice of its intentions so to do, within thirty days after the receipt of proof of

- loss. *Held*, that to authorize the company to repair, notice of their intention so to do must be served within the thirty days specified, and that, in the absence of any provision in the policy to the contrary, delivery of proof of loss to the local agent was delivery to the company for all the purposes of the policy. *The Insurance Company of North America v. Hope* (Ill.), 48, and *note*, 51.
- 2 A policy of fire insurance provided that "if the interest of the insured to the property be any other than the entire, unconditional and sole ownership of the property," it must be so represented to the company and expressed in the policy. Plaintiff effected an insurance on property which had at the time been sold on a judgment and execution against him, but the twelve months allowed to redeem had not elapsed. *Held*, that the non-disclosure of the execution sale avoided the policy. *Reaper City Insurance Co. v. Brennan* (Ill.), 54.
- 3 A. applied to defendant's agent for insurance on his property on the 18th of the month, and it was agreed that the agent should issue and send to A. the policy on that day. The policy was, in fact, issued on, and bore the date of that day, but was not delivered to A., nor the premium paid until the 22d of the month. The policy contained a condition that it should be void in case of prior or subsequent insurance. On the 21st of the same month A. applied to the agent of the P. company for insurance on the same property, and the terms were agreed on and the premium paid. The agent of the P. company, having no blanks for policies, agreed to send a policy to A., and gave him a receipt specifying the property to be insured. The usual policies of the P. company contained a condition of avoidance in case of other insurance. Neither company was informed of the transaction with the other. On the 26th of the month the insured property was burned. As soon as the P. company was informed of the policy issued by defendant, it treated its contract with A. as void. In an action on the policy issued by defendant, *held*, (1) that the policy became operative and binding from the day it was issued, though not delivered, and was, therefore, prior to the P. company's contract; (2) that the effect of the receipt given by the agent of the P. company was to bind the company the same as if a policy, with the ordinary conditions, had been issued; (3) that the contract with the P. company being void by reason of the prior insurance, and being so treated by the company, did not amount to a breach of the condition in defendant's policy against subsequent insurance. *Hubbard v. The Hartford Fire Ins. Co.* (Iowa), 125.
- 4 A policy of insurance against fire was issued on a building, upon the application of an insurance broker, who, without the owner's knowledge or authority, stated in the application that the building was used as a machine shop. It was, in fact, used as an organ factory, the risk on which was more hazardous than on a machine shop. The owner accepted the policy, expressed to be on a machine shop, and paid the premium. In an action on the policy after loss, *held*, that the policy was void, as the minds of the parties never met on the subject-matter of the contract. *Goddard v. Monitor Mutual Fire Ins. Co.* (Mass.), 307.
- 5 A policy of insurance against fire contained this clause: "Nothing but a distinct specific agreement, clearly expressed and indorsed on the policy

shall operate as a waiver of any printed or written condition therein." *Held*, not to refer to stipulations in the policy as to notice and proofs of loss, and that the failure on the part of the insurer to promptly object to the form and sufficiency of such notice and proofs of loss amounted to a waiver of such stipulations. *Franklin Fire Ins. Co. v. Chicago Ice Co.* (Md.), 469.

6. A policy of insurance against fire on an ice-house contained a condition entitled "Builder's risk," that "the working of carpenters, roofers, etc., "in building, altering or repairing the premises named in the policy, without permission indorsed in writing on the policy, should vitiate it." The assured, in an action on the policy, testified that "the ice-house was nearly as good as new, for the reason that he always kept a crew of men and a carpenter or two about the building the year round, and was constantly making repairs and keeping the building in thorough condition." *Held*, that the fact did not vitiate the policy. *Ib.*
7. Proof that the insured was in possession of the premises, claiming and occupying it as owner, is, in the absence of evidence to the contrary, *prima facie* evidence of title and of an insurable interest. *Ib.*
8. A steamboat was insured against fire by a policy conditioned to be void "if gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude, or refined coal oils are kept or used on the premises without consent." *Held*, that the use of kerosene oil to light the boat did not forfeit the policy. *Morse v. Buffalo Fire and Marine Ins. Co.* (Wis.), 587.
9. A policy of insurance contained a provision that if the property insured should be sold or transferred, or any change should take place in title or possession, without the consent of the insurers, the policy should be void. *Held*, that a sale or conveyance of the property, without consent, avoided the policy, although simultaneously therewith a mortgage was executed back by the purchaser for a part of the purchase-money. *Savage v. Howard Ins. Co.* (N. Y.), 741.
10. Where the property was vested in a testamentary trustee, in trust for the heirs of the former owner, and such trustee, being authorized by the will to do so, insured the property for the benefit of the "heirs and representatives" of her testator, *held*, that the trustee, although not named in the policy, could enforce it for the benefit of the beneficiaries under the will. *Ib.*

INTEREST.

See PROMISSORY NOTE, 227.

INTOXICATING LIQUORS.

See CONTRACT, 118; JURY, 122.

JUDGMENT.

See FOREIGN JUDGMENT, 432, and *note*, 435.

JURISDICTION.

In a suit by an administrator brought under a statute of the State to recover for the loss of life of his intestate, caused by being run over by defendant's steamboat in Narragansett bay, where the defendant contended that

the jurisdiction of the State court depended entirely on the saving clause in the act of congress, 1789, chap. 20, § 9, saving to suitors a common-law remedy, and that this being a right of action given by statute, and not existing at common law, was not within that saving clause; *held*, that the intention of the saving clause was to have a remedy or right of action in those courts which proceed according to the course of common law as distinguished from admiralty proceedings, and that the action was maintainable in the State courts. *Chase v. The American Steamboat Co.* (R. I.), 274.

See BANKRUPT LAW, 623; ECCLESIASTICAL LAW, 95; NATIONAL BANK, 667.

JURY.

1. The fact that a juror, in a prosecution for homicide, during the progress of the trial used intoxicating liquor, combined with other curative agents, as a medicine, without medical advice, will not vitiate the verdict in the absence of any showing that it was so used without the knowledge of the prisoner or his counsel, or that its effects were intoxicating. *State v. Morphy* (Iowa), 122.
2. After a sealed verdict was returned, but before it was opened, one of the jury became insane. The court received the verdict in the presence of the rest of jury, and denied a request to have them polled. *Held*, error, and that a *venire de novo* should be granted. *Norvell v. Deval* (Mo.), 413.

See CONSTITUTIONAL LAW, 169; VERDICT, 724.

LANDLORD AND TENANT.

1. Where property has been leased subsequent to execution of a mortgage thereon, the mortgagee, on entry for condition broken, may treat the tenant as a trespasser, and bring ejectment, even without notice; but if the mortgagee receives rent from the tenant the relation of landlord and tenant will be thereby created between them. The mere receipt of rent, however, will not revive the tenancy for the entire unexpired term of the lease, but only from year to year. *Gurtside v. Outley* (Ill.), 59.
2. Defendant hired of plaintiff a store for one year, from June 1, 1868, for a certain annual rent, payable quarterly, and the taxes. In May, 1869, defendant told plaintiff that he was looking for another store, but would like to remain, after the year, "at the same rate," either party to terminate the tenancy by one month's notice, in writing. Plaintiff assented. On June 1, 1869, defendant sent to plaintiff a notice, in writing, that he should "leave the store on July 1." The plaintiff being absent the notice was put in his office letter-box, where he found it the next day. In an action for a quarter's rent, and the taxes for 1869, *held*, (1) that the notice, under the agreement, need not expire at the end of the quarter, but might be given at any time during the tenancy; (2) that the notice took effect only from the time when the plaintiff received it, and on July 2; (3) that defendant was liable to pay only such a proportional part of the annual rent and taxes as a month and two days bore to a twelve-month. *May v. Rice* (Mass.), 828.

See DISTRESS, 542.

LEGISLATIVE POWER.

See CONSTITUTIONAL LAW, 528.

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LESSEE.

See LANDLORD AND TENANT, 59.

LEX LOCI CONTRACTUS.

See CONTRACT, 118.

LIEN.

See VENDOR'S LIEN, 784.

LOCAL OPTION LAW.

See CONSTITUTIONAL LAW, 115.

LORD'S DAY.

See ACCOUNT STATED, 605 ; SUNDAY, 219.

MALPRACTICE.

See PHYSICIANS AND SURGEONS, 141, 147.

MAJORITY.

See CERTIFICATE, 784.

MARINE TORTS.

See JURISDICTION, 274.

MARRIAGE.

A marriage between slaves, void at the time, is made valid by ratification of the parties after they become free, and their children have heritable blood. *Jones v. Jones* (Md.), 505.

See BREACH OF PROMISE TO MARRY, 154.

MASTER AND SERVANT.

Defendant was the keeper of a gun store. His servant, a clerk in the store, while engaged, during defendant's absence, in exhibiting a gun to a customer, loaded it, contrary to defendant's orders. In so doing it was accidentally discharged and shot the plaintiff, who was on the opposite side of the street. *Held*, that the defendant was liable for the injuries. *Garretsen v. Duenckle* (Mo.), 405.

MEASURE OF DAMAGES.

See ACTION, 188 ; COVENANT, 235 ; DAMAGES, 28 ; TELEGRAPH COMPANY 156.

MERGER.

See DEVISE, 480.

MISCONDUCT IN OFFICE.

See OFFICER, 172.

MORTGAGE.

See LANDLORD AND TENANT 59.

MUNICIPAL CORPORATION.

1. A municipal corporation cannot so adjust the grade of its streets as to turn surface water upon the lots of adjacent owners ; nor can it lawfully permit property owners on a street to fill up a portion thereof in front of their lots in such a manner as to turn the surface water upon the property of others. *City of Aurora v. Reed* (Ill.), 1.
2. A city ordinance for regulating the sale of intoxicating liquors provided that druggists might sell such liquors for certain purposes, but required them, under a heavy penalty, to furnish a quarter-yearly statement verified by their own and their clerks' and servants' affidavits, showing the kind and quantity of liquor sold, when and to whom sold, etc. In a prosecution under this ordinance to recover the penalty for failing to furnish the statement, *held*, that the city council had no power to pass the ordinance ; that it was unreasonable and oppressive and an invasion of the sanctity of private business. *City of Clinton v. Phillips* (Ill.), 52, and *note*, 54.
3. A county is not liable to a private action for injuries occasioned by reason of the neglect of its officers to keep a bridge in repair. *White v. County of Bond* (Ill.), 65, and *note*, 66.
4. A city was authorized by its charter to provide by ordinance for " licensing, taxing and regulating hacks, drays, wagons and other vehicles, used within the city for pay." *Held*, that an ordinance, licensing and taxing vehicles used in hauling into and out of the city was void, as not being authorized by the charter, and, *semble*, that the legislature could give no authority to pass such an ordinance. *City of St. Charles v. Nolle* (Mo.), 440.
5. The defendants, a municipal corporation, built a sewer, which was defective, and plaintiff's land was flooded and injured thereby. *Held*, that this was a taking of plaintiff's property within the meaning of the constitution, for which compensation was due, and that defendants were liable irrespective of negligence. *Thurston v. City of St. Joseph* (Mo.), 463.
6. When a town is divided and a new town created out of a part of the territory, the latter is not bound to contribute toward the payment of debts contracted before the division, in the absence of any statute to that effect. *Town of Depere v. Town of Bellevue* (Wis.), 602, and *note*, 604.
7. An injunction will lie, at the suit of the proprietor, to restrain a municipal corporation from opening a new street on his land, and collecting a sum of money out of him, assessed as his benefit of the proposed improvement, and his contribution to the cost of opening the street, when the proceedings of the corporation appear to be regular, and their invalidity is to be shown by extrinsic evidence. *Miller v. Mayor* (Ala.), 768.

See CONSTITUTIONAL LAW.

NATIONAL BANK.

1. A national bank has the power, under the National Currency Act of Congress of 1864, chap. 106, to make by-laws providing that the shares of its capital stock shall be transferable only on its books ; that no stockholder shall be allowed to sell or transfer his stock while indebted to the bank, without the assent of its directors ; and that the stock of any stockholder shall be held pledged and liable for the payment of any debt due or owing from such stockholder, and may be sold at public auction for the satisfac-

tion of such debt, on default of payment thereof. *Lockwood v. Mechanics National Bank* (R. I.), 258.

2. In all cases where an act is to be done by a corporate body or a part of a corporate body and the number is definite, a majority of the whole number is necessary to constitute a legal meeting, although at a legal meeting, where a quorum is present, a majority of those present may act. Hence, a by-law adopted at a meeting of six *ad interim* directors of a national bank, which had twelve directors before its conversion, is invalid, because not adopted by a majority or quorum of the board. *Ib.*
3. Action brought by a citizen of New York, in a State court of New York, against a national bank located in Boston. *Held*, (1) that the court was not ousted of jurisdiction by section 57 of the national currency act (13 Stat. at Large, 99), that statute being permissive and not mandatory as to the courts in which a national bank may be sued; and, *semble*, that congress had not the power to deprive State courts of jurisdiction in such cases; (2) that the defendant was a citizen of Massachusetts, within the meaning of the acts relating to the removal of causes to the Federal courts; (3) that the joinder in the action as defendants, of the drawers of the check, would not deprive the bank of the right to alone apply for a removal of the case to the Federal court, the causes of action being distinct and only properly joined by virtue of a State statute; (4) by a divided court, that the cause could not be removed by the bank into the Federal court, under the act of congress of March 2, 1867, as being a corporation, it could not make the affidavit required by the act. *Cook v. State National Bank* (N. Y.), 667.

NAVIGABLE STREAMS.

Information to restrain the defendant from rebuilding a dam across a river alleged to be within tide-water. The water, at the place, rose and fell two feet with the flow and ebb of the tide, the fluctuation being caused by the meeting of the sea water with the river water. The river was only navigated with pleasure boats. *Held*, (1) that defendant's dam was within tide-water, and (2) that the river was navigable water. *Attorney-General v. Woods* (Mass.), 880.

NEGLECT OF WOUNDS.

See CRIMINAL LAW, 122.

NEGLIGENCE.

1. Plaintiff desired to cross defendant's track at a public crossing, but was prevented from doing so by a train of defendant's cars standing at that point. She then attempted to cross at another place, where there was no public crossing, and, in so doing, was struck and injured by defendant's car. *Held*, that, notwithstanding the fact that plaintiff was not rightfully on the track at the place of the injury, yet, if the injury might have been avoided by the use of ordinary care and caution by the defendant, the latter was liable therefor. *Brown v. The Hannibal & St. Joseph Railroad Co.* (Mo.) 420, and *note*, 425.

2. Declaration against a railroad company for negligence whereby plaintiff was injured, not averring that he was himself in the exercise of due care, *held*, good. *Thompson v. North Missouri Railroad Company* (Mo.), 448.

See FERRYMAN, 650; FIRE, 550; MASTER AND SERVANT, 405; PHYSICIANS AND SURGEONS, 141, 147.

NEW TRIAL.

See CRIMINAL LAW, 567.

NOTICE IN NEWSPAPERS.

When legal notices are directed to be published in a newspaper, a newspaper in the English language is meant, in the absence of express directions to the contrary. *Graham v. King* (Mo.), 401.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 328.

"OFFICE OR PUBLIC TRUST."

See CONSTITUTIONAL LAW, 734.

OFFICER.

1. A register of deeds falsely certified over his official signature, that he had examined a title, and found it unincumbered. It was no part of his official duty to make examinations or certificates of title. *Held*, that he was guilty of misconduct in office. *State v. Leach* (Me.), 172.
2. An officer will not be protected by an execution valid on its face if he have notice *aliunde* of some jurisdictional defect which renders the judgment void; but he may, in such case, demand indemnity from the execution creditor. *Grace v. Mitchell* (Wis.), 613.

See POLICE OFFICER, 373, 375

ORDINANCE.

See MUNICIPAL CORPORATION, 52, 440.

PAROL EVIDENCE.

See EVIDENCE, 109, 491; STATUTE OF FRAUDS, 495; TRUST, 67; VENDOR AND PURCHASER, 715.

PARTNERSHIP.

1. Where two persons entered into a contract jointly, for the keeping of sheep for certain shares of the wool, it was *held*, that they would be so far regarded as partners as that a settlement made by one of them, in the name of both, would bind both. *Stapleton v. King* (Iowa), 109.
2. One of three partners, with the consent of the other partners, mortgaged his interest in the firm property, to secure an individual debt of plaintiff, who sold the property under the mortgage and bought it in himself. Another person at the same time and in like manner became possessed of another partner's interest. After the executions of the mortgages, but before the sale, the third partner sold his interest to a stranger. After these transac-

tions, a judgment was recovered against the firm on firm debts, and execution was levied on the property which had belonged to the firm, by the defendant as sheriff. In an action of trover against the sheriff, *held*, that plaintiff could not recover, as he acquired no title by the sale under the mortgage as against firm creditors. *Menagh v. Whitwell* (N. Y.), 683.

PASSENGER.

See RAILROAD COMPANY, 801.

PAYMENT.

The plaintiff sold and delivered certain goods to the defendant for a stipulated price, a part of which was paid in cash, and agreed to accept in payment of the balance, a note of a third party, and run the risk of its being paid, relying upon the representations of the defendant, who stated that the note was good, and would be paid at maturity. The note was not paid at maturity, and proved worthless, the drawers having failed several days before it became due. On the day of its maturity the plaintiff notified the defendant of its non-payment, and of the failure of the makers, and demanded of him payment of the balance due on the goods sold. *Held*, that if the agreement to accept the note as payment was induced by the fraudulent misrepresentations of the defendant, such fraud rendered the receipt given by the plaintiff invalid, and he had the right to affirm the sale and sue in *assumpsit* for the price of the goods. *Hoopes v. Strasburger* (Md.), 588.

See CHECK, 708.

PERCOLATING WATER.

See WATER-WORKS, 852.

PHYSICIANS AND SURGEONS.

1. The law requires of physicians and surgeons, in the treatment of their patients, the use of ordinary skill and diligence only, the average of that possessed by the profession as a body, and not of the thoroughly educated only; having regard to the improvements and advanced state of the profession at the time of the treatment. *Smother v. Hanks* (Iowa), 141, and *note*, 146.
2. The civil responsibility of physicians and surgeons in the treatment of their patients, is not governed by the same rule of law that apply to mechanics and artisans in the execution of their work. *Almond v. Nugent* (Iowa), 147.

PLEADING.

See DURESS OF PROPERTY, 10; NEGLIGENCE, 443; SLANDER, 534.

PLEDGE.

See PROMISSORY NOTE, 319.

POLICE OFFICER.

1. On the trial of an indictment for an assault upon a police officer, evidence that he was at the time of the offense acting as such officer, and that he

had publicly acted as such for four years previously, is sufficient to prove that he was a police officer. *Commonwealth v. Kane* (Mass.), 373.

3. On the trial of an indictment for assaulting a police officer, evidence that the person assaulted was, at the time of the assault and with the defendant's knowledge, acting as a police officer, and wearing the uniform and badge of such officer, is sufficient proof that he was a police officer, to be submitted to the jury. *Commonwealth v. Tobin* (Mass.), 375.
- 3 A constable has a right by virtue of his office, and without a warrant, to enter any house, the door of which is unfastened, in which there is a noise amounting to a breach of the peace, and to arrest any person disturbing the peace there in his presence. *Ib.*
4. Any affray or assault is a disturbance of the peace. *Ib.*
5. The unlawful omission of an officer to make a subsequent complaint against a person, whom he has lawfully arrested without a warrant, is no defense to an indictment of the person for assaulting the officer in resisting the arrest. *Ib.*

POOR DEBTOR LAW.

See BANKRUPTCY, 245.

PRINCIPAL AND SURETY.

The general agent of an insurance company appointed a local agent, and took from him a bond in the name of the company, with sureties, conditioned that the local agent should pay over all moneys received by him. The local agent having made default in paying over certain moneys received for premiums, the general agent paid the same in accordance with his contract with the company. In an action upon the bond, in the name of the company, for the use of the general agent, *held*, (1) that the payment by the general agent did not discharge the bond so as to prevent subrogation; (2) that notice to the sureties of defalcation of the principal was not necessary in order to charge the sureties. *Hough v. The Aetna Life Insurance Company* (Ill.), 18.

PROCESS.

See OFFICER, 613.

PROMISSORY NOTE.

1. The alteration of a promissory note after delivery by filling a blank left therein, so as to make the note draw interest at ten per cent, will not invalidate it in the hands of a *bona fide* indorsee for value before maturity. *Rainbolt v. Eddy* (Iowa), 152, and *note*, 153.
2. A pledgee of negotiable paper has generally a right to collect the whole amount of securities pledged to him, and account to the pledgor for the surplus over his debt. But in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgor. *Atlas Bank v. Doyle* (R. I.), 219.
3. The holder of commercial paper is presumed to be a holder for value, until the contrary is shown; and, by presenting such paper, he makes a *prima facie* case, sufficient to justify a verdict for him, if the defendant does not rebut it. But if the defendant does produce evidence to rebut this pre-

- sumption, the burden is still on the plaintiff, taking all the testimony together to show a valuable consideration by a preponderance of proof on his side. If, however, the defendant, not disputing the original consideration, takes some new ground of defense, as payment, failure of consideration, etc., then the burden is on him to prove this matter of avoidance. *Ib.*
4. Where a promissory note is made payable at a given time after date, with interest payable semi-annually, interest may be computed, in making up the judgment, on all installments of interest overdue and remaining unpaid; but no installments of semi-annual interest will be considered as due after the maturity of the note, because, after that, both the accruing interest and the principal are due, not on any particular day, but every day till they are paid. *Wheaton v. Pike* (R. I.), 227.
 5. Defendant, for the maker's accommodation, indorsed a promissory note payable to the maker's order, and before the maker indorsed it. The maker, in negotiating the note to the plaintiff, altered its face so as to make it payable to the plaintiff's order, without the defendant's knowledge or consent. In an action to charge the defendant as an original promisor, *held*, that the alteration was material and avoided the defendant's liability. *Stoddard v. Penniman* (Mass.), 863.
 6. The defendants made a note in this form: "We, A and B, as principal, and C and D as surety, promise to pay to the order of ourselves," etc., signed on the face by A and B, and indorsed by all the parties. *Held*, that D's liability was that of surety and joint promisor in a note payable to the order of the principals and by them indorsed. *National Pemberton Bank v. Lougee* (Mass.), 867.
 7. Defendant made a promissory note, being fraudulently induced by the payee to suppose that he was signing an instrument of a different character. *Held*, that the note was void in the hands of a *bona fide* holder for value before maturity. *Briggs v. Ewart* (Mo.) 445, and *note*, 449.
 8. A surety on a promissory note is not discharged by a usurious agreement between the maker and the payee for an extension of time. *Meiswinkle v. Jung* (Wis.), 572.
 9. An indorsement, void for usury, is valid to pass the title of a note to the indorsee, and enable him to collect the note of the maker. *Armstrong v. Gibson* (Wis.), 599.
- See ESTOPPEL, 89; HUSBAND AND WIFE, 711; INDICTMENT, 706; RECOUPMENT, 250; TAXATION, 132; USURY, 45.

PROOF OF LOSS.

See INSURANCE, 48.

PUBLIC CORPORATION.

See INJUNCTION, 454.

RAILROAD COMPANY.

1. A railroad corporation, in consideration of the payment by a person of a certain sum of money, and of his agreement to supply the passengers on the trains with iced water, issued to him a season ticket over their road, and permitted him to sell popped corn on their trains. *Held*, that while

traveling under this contract he was a passenger, and not a servant of the corporation. *Commonwealth v. Vermont & Massachusetts Railroad Co.* (Mass.) 801, and *note*, 804.

2. A person was killed while riding on defendant's road, on a season ticket containing this condition: "The corporation assumes no liability for any personal injury received while in a train to any season ticket holder." *Held*, that this condition did not relieve the defendant from their legal liability, on an indictment under a penal statute, for gross negligence. *Id.*
3. The rolling stock of a railroad company is personal property, and, as such, liable to be seized and sold for the collection of a tax against the company. *Randall v. Elwell* (N. Y.), 747, and *note*, 751.

See NEGLIGENCE, 420; FIRE, 556.

RATIFICATION.

See MARRIAGE, 505.

REAL PROPERTY.

Where one person owns the lower story of a building, and another the upper story, with right of way thereto, the latter cannot recover of the former for necessary repairs of the roof, made by him. *Ottumwa Lodge v. Lewis* (Iowa), 185.

REBELLION.

See STATUTE OF LIMITATIONS, 450; WAR, 788.

RECEIPT.

See EVIDENCE, 109.

RECOUPMENT.

In an action by the payee upon a promissory note, the consideration of which was an agreement signed by the plaintiff, to convey to the defendant, on or before January 1, 1866, twenty-five hundred dollars of the capital stock of the King Gold Mining Company, at subscription price, *held*, that the defendant might defend against the action by showing that no transfer or tender of the said stock was made to him until after August, 1866, and might recoup his damages arising from the plaintiff's failure to perform his agreement. *Hill v. Southwick* (R. I.), 250.

REMOVAL OF CAUSE.

A statute required foreign insurance corporations, before doing business within the State, to agree not to remove into the Federal courts any suits brought against them in the State courts. *Held*, that the statute was constitutional. *Morse v. The Home Insurance Company* (Wis.), 580, and *note*, 587.

See NATIONAL BANK, 667.

REPAIRS.

See INSURANCE, 48.

REPEAL.

See STATUTE, 804; USURY, 777.

REPLEVIN.

An offer, under a general promise of indemnity, but without direction from the execution creditor to levy upon any specified property, seized chattels in execution under a void judgment. In replevin against the officer and the execution creditor, it appearing that the latter never had possession of the goods; *held*, that the action could not be maintained as to him. *Grace v. Mitchell* (Wis.), 613.

SALE.

1. A sale of fish hereafter to be caught passes no title to the fish when caught. *Low v. Pew* (Mass.), 857.
2. Action of trover against executors for goods claimed by plaintiffs under a verbal contract whereby the testatrix, for a valuable consideration, agreed to sell and convey to them all the personal property she then had and all that she might thereafter acquire and die possessed of. *Held*, (1) that the contract was inoperative to pass title to the subsequently acquired property, and that plaintiffs could recover for the conversion of such goods only as testatrix had when the contract was made; (2) that the burden of proof was on the plaintiffs to show which these were. *Wilson v. Wilson* (Md.), 518.

See ESTOPPEL; VENDOR AND PURCHASER.

SALE AND DELIVERY.

1. T. sold to plaintiff part of a growing crop of corn, designating the part sold by cutting off the tops of one row. Plaintiff paid \$80 in cash, but, by the terms of the sale, T. was to cut and shock a part of the corn, and to gather the remainder, and the corn was then to be measured and paid for by the bushel. Subsequently, the said corn was levied on by virtue of an execution against T. In a proceeding to try the right of property, there was evidence tending to show that it was the intention of the parties that the sale should be complete and absolute at the time it was made. *Held*, that an instruction to the jury that, if the vendee was to cut and measure the corn, and it was then to be paid for by the bushel, no title passed to the vendee, and the property was liable to the executor, was error. Whether title passed or not was a question of intention, and was for the jury. *Graff v. Fitch* (Ill.), 85, and *note*, 90.
2. A husband, for a good consideration, conveyed cattle to his wife by an absolute bill of sale which he delivered to her. The cattle were at the time upon the husband's farm where both he and the wife resided. No other delivery of the cattle was made, and they remained and were used upon the farm as before. The cattle having afterward been attached on a writ against the husband, *held*, in replevin by the wife, that there was no sufficient delivery of the cattle from the husband to the wife. *McKee v. Garcelon* (Me.), 200.
3. The plaintiff purchased, in good faith, bales of wool stored in the seller's factory, and the seller agreed to keep the wool for a time where it was on storage for the plaintiff, who had no place to store it. The seller, by the plaintiff's direction, opened some of the bales, took out of them samples, and delivered them to the plaintiff together with a bill of parcels wherein

was acknowledged the receipt of the contract price. Plaintiff desired the parcels to resell the wool by. *Held*, that there was evidence to go to the jury of a delivery sufficient as to creditors. *Ingalls v. Herrick (Mass.)*, 303

SAVING CLAUSE.

See STATUTE, 304.

SEALED VERDICT.

See JURY, 412.

SEASON TICKET.

See RAILROAD COMPANY, 301.

SEIZIN.

See COVENANT, 426.

SEPARATION OF JURY.

See CRIMINAL LAW, 539.

SEWER.

See MUNICIPAL CORPORATION, 463.

SHAREHOLDER.

See CORPORATION, 238.

SLANDER.

1. In an action of slander the declaration was that defendant charged plaintiff with keeping "a bad house," *innuendo* a bawdy-house. *Held*, that the declaration was bad for want of a sufficient *collegium* to justify the *innuendo*. *Peterson v. Sentman (Md.)*, 534.
2. Action for slander in charging the plaintiff with the crime of adultery. Plea, that the words were true. *Held*, that a preponderance of evidence would support the plea, and that the defendant was not bound to prove the plea beyond a reasonable doubt as on indictment for crime. *Ellis v. Russell (Me.)*, 304.

SLAVES.

See MARRIAGE, 505.

SPECIAL LEGISLATION.

See CONSTITUTIONAL LAW, 415.

STATE BONDS.

The bonds of the State were expressed on their face to be payable in gold and silver coin. The legislature passed a resolution to pay them in legal tender notes. *Held*, that the court had no power to compel the State officers to make payment in coin. *State v. Hays (Mo.)*, 408.

STATUTES.

Defendant was proceeded against for violation of a statute which had been repealed by a later statute, but which provided that nothing therein con-

tained should affect "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act." The offense alleged occurred before the latter statute took effect, but after its approval by the governor. *Held*, that the indictment was sustainable. *Commonwealth v. Bennett* (Mass.), 804.

STATUTE OF FRAUDS.

1. Plaintiff and defendant made an oral contract for the sale of property by the plaintiff to the defendant, and each deposited a sum of money with a third party, to be paid by him to either, in case the other should fail to fulfill his part of the contract. *Held*, that the deposit was not an "earnest" within the statute of frauds. *Howe v. Haywood* (Mass.), 806.
2. Plaintiff, at defendants' request, bought lands at sheriff's sale in his own name for their benefit. The defendants promised orally to pay the purchase-money, but failed to do so; whereupon, pursuant to the conditions of sale, the land was resold at a less price and plaintiff was compelled to pay the difference, to recover which this action was brought. *Held*, that the contract between plaintiff and defendants was one of agency and not within the statute of frauds, and was therefore provable by parol evidence. *Baker v. Wainwright* (Md.), 495.
3. Defendant orally promised to indemnify plaintiff for indorsing the promissory note of another, and plaintiff, relying solely upon such promise, indorsed the note. *Held*, that the promise of indemnity was not void under the statute of frauds. *Vogel v. Melms* (Wis.), 608.

See ACTION, 818; TRUST, 67.

STATUTE OF LIMITATIONS.

The courts of a county of Missouri were closed for a time in consequence of the rebellion. *Held*, that the statute of limitations did not cease to run for the time as to a promissory note made in the county. *McKinzie v. Hill* (Mo.), 450.

STOCKHOLDERS.

See CORPORATION, 24.

STOLEN DEED.

See DEED, 546.

STREETS.

See MUNICIPAL CORPORATION, 1, 768.

SUBROGATION.

See PRINCIPAL AND SURETY, 18.

SUNDAY.

An action on the case for injuries to plaintiff's horse by reason of the defendant's neglect and careless driving during a pleasure drive on Sunday, for which he was hired, *held*, not maintainable. *Parker v. Latner* (Me.), 210 and note, 212.

See ACCOUNT STATED, 606.

SURETY.

In a suit against a cashier of a bank, and his sureties on their bond, where the defendants pleaded severally, it is no defense to the suit that the directors have been negligent in examining his accounts. To avoid the bond on the ground of fraud on the part of the bank or its directors, there must be a fraudulent concealment of something material for the surety to know. *Atlas Bank v. Brownell* (R. I.), 281.

See PRINCIPAL AND SURETY, 18; PROMISSORY NOTE, 572.

SURGEONS.

See PHYSICIANS AND SURGEONS, 141, 147.

TAXATION.

A resident of Iowa had deposited for safe-keeping in Illinois promissory notes that had never been brought by him into Iowa. *Held*, that they were subject to taxation in Iowa. *Hunter v. The Board of Supervisors* (Iowa), 122.

See ASSESSMENT FOR LOCAL IMPROVEMENT, 412.

TELEGRAPH COMPANY.

Plaintiff, having received an offer of a cargo of corn at 90 cents a bushel, delivered to defendant — a telegraph company — for transmission, a message in reply to the offer, written on a "night-message blank," in these words: "Ship cargo named at 90, if you can secure freight at ten — wire us the result," and paid 48 cents — the rate for night messages, and which was less than the day rates. The blank contained the following printed condition: "It is agreed between the sender of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message, beyond the amount received by said company for sending the same." The message was sent, but was not delivered; by reason whereof, the plaintiff failed to obtain the corn at the terms offered, and the price of corn and freight having advanced, plaintiff was compelled to purchase at higher terms. *Held*, (1) that the condition in the blank was not reasonable, and did not exonerate the company from liability beyond the sum paid for sending the message; (2) that, assuming that the corn would have been forwarded at the terms named but for the non-delivery of the message, the measure of damages was the difference between the price stated, and that which the plaintiff would have been obliged to pay at the same place, in order by due diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of corn, together with the additional freight. *True v. International Telegraph Co. (Me.)*, 156, and note, 168.

TENANT AT WILL.

See FIXTURES, 371.

TIDE WATER.

See NAVIGABLE STREAMS, 380.

INDEX.

TIME.

A debtor's property was attached on March 8, at 7 o'clock, P. M. and his petition in bankruptcy was filed July 8, succeeding, at 8 o'clock, P. M. *Held*, that the maxim that in law there is no fraction of a day, did not apply and that the attachment was dissolved under section 14 of the bankrupt act, dissolving attachments made within four months of the commencement of proceedings in bankruptcy. *Westbrook Manufacturing Co. v. Grant (Me.)*, 181.

TITLE.

See SALE AND DELIVERY, 85.

TOWN.

See MUNICIPAL CORPORATIONS, 602.

TRIAL.

See VERDICT, 724.

TRIAL BY JURY.

See CONSTITUTIONAL LAW, 169.

TRUST.

1. B. holding the legal title to real property, but upon a secret parol trust for his wife and her brother K. executed a deed thereof, absolute in form, in which his wife joined, to K., the brother, without any pecuniary consideration and without the knowledge or consent of K. B. caused the deed to be recorded. Subsequently, B. said to K., "The property of your sister has been deeded to you, and I want you to look after her interests, and see that she has her property." K. replied, "all right," or "very well," or words to that effect. Afterward K. in a letter to his mother, and also in a document intended to be a will, incidentally recognized the conveyance as a trust. *Held*, that the assent of K. to the conveyance, in connection with the words of B. informing K. thereof, created an express trust in favor of B.'s wife, and that the subsequent letter and document were sufficient evidence of the trust within the statute of frauds. *Kingsbury v. Burnside (Ill.)*, 67.
2. *Held*, also, that the existence of a trust having been established by a writing, parol evidence of conversations concerning the trust, between the trustee and brother, referred to in the writing, was admissible for the purpose of describing or defining what was meant by the writing. *Id.*

TRUSTEE.

See INSURANCE, 741.

USURY.

- 1 Where, by statute, the taking of usury does not avoid the contract, but only forfeits the interest, the defense of usury is not admissible under the plea of non-assumpsit, but must be pleaded specially and proved strictly as averred. *Frank v. Morris (Ill.)*, 4.

2. The maker of a note for a certain sum, payable in currency with legal interest, in order to obtain an extension of time, gave a new note for the amount, payable in gold coin, or in currency with the premium on gold, at a certain date. *Held*, that the second note was usurious. *Gates v. Hackethal* (Ill.), 45.
3. Plaintiff purchased real estate subject to a mortgage and, as part of the consideration, agreed to pay the mortgage debt. *Held*, that plaintiff could not maintain a bill in equity to restrain a sale of the premises by the mortgagee under a power in the mortgage, on the ground that the mortgage debt was usurious. *Hough v. Horsey* (Md.), 484.
4. A borrower who has not agreed to pay usurious interest cannot maintain the defense of usury to an action to recover the money loaned, on the ground that a third person has paid the usury demanded by the lender for making the loan. *McArthur v. Schenck* (Wis.), 643.
5. The repeal of usury laws takes away the defense of usury in actions thereafter brought on any contract, whether made prior to or after the repeal. *Woodruff v. Scruggs* (Ark.), 777.

See PROMISSORY NOTE, 573, 580.

VARIANCE

See INDICTMENT, 706.

VENDOR AND PURCHASER.

1. Where a contract is made for the sale of land, the vendor to give a warranty deed on payment of the purchase-money, and between the time of the contract and the making of the deed, a portion of the land is condemned for a railroad, damages for the taking of the land belong in equity to the purchaser, and he cannot treat such taking as an incumbrance, and recover therefor on the covenants in the deed. *Stevenson v. Lochr* (Ill.), 86.
2. In an action upon promissory notes given in part payment for a distillery and fixtures, the defense set up was that by reason of certain violations of the revenue laws, by the payee of the notes and vendor of the property, prior to the purchase by the defendant, a portion of the property was, after such purchase, seized, condemned and sold by the officers of the United States, whereby the defendant's title failed and the property was lost. On the trial the defendant put in evidence the record of the seizure and condemnation. It did not disclose by whom, or at what time, the penalty which worked a forfeiture and loss of the property was incurred. An offer of the defendant to prove by extrinsic evidence that the illegal acts established by the decree were done by those operating the distillery before the purchase by him, was excluded by the court. *Held*, that such exclusion was error. *McKnight v. Devlin* (N. Y.), 715.
3. A vendee of chattels, in case of failure of title to a portion thereof, is not bound to rescind the contract *in toto*, but may retain so much as he has secured a title to, and recover damages for the loss of the residue. It is optional with him to recoup such damages in action against him for the purchase-money, or to bring an action therefor; and such option is not defeated by a transfer of the claim against him, and the bringing of an action in the name of the transferee, except in cases where an indorsee or

transferee of negotiable paper acquires a title discharged of all equities and valid against all defenses. *Ib.*

4. Upon an executory contract of sale, with a warranty as to the quality of the article contracted for, the purchaser is not bound to return, or offer to return, the article on discovering that it is of an inferior quality, but he may retain and use the property, and have his remedy upon the warranty. But the purchaser in an executory sale cannot rely upon a warranty as to open, plainly apparent defects, any more than he could upon a sale of goods *in presenti*. *Day v. Pool* (N. Y.), 719.

VENDOR'S LIEN.

A vendor's lien is not assignable. *Hecht v. Spears* (Ark.), 784.

VERDICT.

- A jury, having agreed upon a verdict, reduced it to writing, sealed it, and separated. When produced in court, the next morning, it was for the plaintiff, for \$6,000, and was entered upon the minutes of the court. On the polling of the jury, they failed to agree, and were directed by the court to retire to their room. The jury, having retired, returned for instructions as to whether they could increase their verdict. Being instructed that they might decide upon any verdict to which they all agreed, they brought in a verdict for the plaintiff for \$7,000. *Held* no error. Until the polling of the jury takes place, and the assent of the jurors, either express or tacit, is given to the verdict, and the jury is dismissed, and has become no more a jury in the case, the verdict is, within certain limits, in the power of the jury, and, to a certain extent, within the direction of the court. *Warner v. The New York Central Railroad Company* (N. Y.), 724.

See CRIMINAL LAW, 575.

WAGER.

See ILLEGAL CONTRACT, 56, and *note*, 58.

WAIVER.

See INSURANCE, 69.

WAR. °

- Action on a promissory note. Plea that when the note was made, plaintiff was a citizen of Minnesota, and defendant a citizen of Arkansas, aiding the rebellion and public enemies of the United States. *Held*, that the plea was good. *Rice v. Shook* (Ark.), 783.

See STATUTE OF LIMITATIONS, 450.

WARRANTY.

See DEVISE, 480; VENDOR AND PURCHASER, 719.

WATER-COURSE.

- In an action for the diversion of a water-course it appeared that, at a point on defendant's land, about five rods from plaintiff's land, the water ceased to flow between defined banks but spread out over the surface of the ground

and so ran to and across plaintiff's land and then began to flow again in a defined channel. *Held*, that the stream did not cease to be a natural water-course, and that plaintiff could maintain the action. *Macomber v. Godfrey* (Mass.), 849.

WATER-WORKS.

Defendants built a reservoir on land sold to them by the plaintiff for that purpose. Water from the reservoir percolated through the soil and injured plaintiff's adjacent lands. *Held*, that defendants were liable for the damages. *Wilson v. City of New Bedford* (Mass.), 852.

WILL.

1. A testator, after devising all his real estate to his widow for life, devised a specific parcel thereof to B and the "balance" thereof to C. *Held*, that the devise to C was specific and not residuary, and that C was entitled to contribution from the other devisee for a portion of the land devised to him taken to pay debts of the testator and the dower of the widow, who elected not to take under the will. *Henderson v. Green* (Iowa), 149.
2. A testator bequeathed \$20,000 to the "Society for the relief of Indigent Aged Females." The plaintiff, "St. Luke's Home for Indigent Christian Females," and the defendant, "An Association for the Relief of Respectable Aged Indigent Females in the city of New York," each claimed to be the legatee intended. *Held*, that the defendant's name answering more closely to that in the will, it was entitled to the bequest. *St. Luke's Home v. An Association, etc.* (N. Y.), 697.
3. Under a statute providing that lands may be devised "to every person capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise," *held*, that a devise to the government of the United States was void. *Will of Fox* (N. Y.), 751.
4. Where no express power is given to executors to sell lands, a power will not be implied from the mere charge of debts upon the lands. *Id.*

WORDS.

"*Due Process of Law*," see CONSTITUTIONAL LAW, 559.

"*Earnest*," see STATUTE OF FRAUDS, 306.

"*Fraction of a Day*," see TIME, 181.

"*Freshet*," see AWARD, 224.

"*Office or Public Trust*," see CONSTITUTIONAL LAW, 724.

"*Same Rate*," see LANDLORD AND TENANT, 559.

"*Willfully and Maliciously*," see CRIMINAL LAW, 209.



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